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CONVEYANCER'S NOTEBOOK

THE CHIEF LAND REGISTRAR

Nationalisation is rather under a cloud at the moment: the taxpayer complains that he has to subsidise inefficiency, the consumer complains that he does not get service and that initiative is lacking. The Chief Land Registrar must derive some satisfaction from the facts that none of these complaints can fairly be levelled at his organisation and that it might well serve as a model for others. No doubt the system of land registration is capable of improvement, but it has attained an extremely high standard. Practitioners know that they can receive help over difficult transactions, novelty does not frighten the staff—indeed, its members seem to welcome tackling new developments and helping to solve the problems presented by them—and suggestions for improving the system or getting over difficulties receive careful consideration; the Registry staff is courteous at all times. The high standard attained is in no small measure due to the Chief Land Registrar who has always emphasised his desire to serve practitioners. In particular, he has sought to explain how the registry functions and not to treat it as a mystery with rules to be obeyed and not questioned. We would like, therefore, to express our sincerest congratulations to the Chief Land Registrar on his knighthood, which he has justly merited by the services he has rendered to conveyancers and those having interests in property.

STAMP DUTY ON EXCHANGES

A correspondent has raised a query whether the note in *Key and Elphinstone*, 15th ed., Vol. 1, p. 955, on the stamp duty on deeds of exchange is accurate. The note reads as follows:—

"Where no money is paid for equality of exchange, or where

the money does not exceed £100, no *ad valorem* stamp is required; but where the amount exceeds £100, the same stamp is required as on a conveyance on sale: Stamp Act, 1891, s. 73; Finance (1909–10) Act, 1910, s. 73; Finance Act, 1947, s. 54; Finance Act, 1952, s. 73. If the amount exceeds £100 and does not exceed £500, £3,000 or £3,450, the appropriate declaration . . . should be inserted."

First, it is clear that section 73 of the Stamp Act, 1891, only applies to exchanges of real or heritable property for real or heritable property. There must on the clear words of the section be real or heritable property on both sides of the transaction. Possibly, there may be other property as well. Where the property moving from either one or both sides consists only of other types of property, *e.g.*, leaseholds, undivided shares, goods, stock, securities, etc., the section does not apply. This does not, however, necessarily mean that a similar liability to stamp duty on other exchanges cannot be reached by a different road.

Except in the case of exchange of or for stock or securities referred to below, there is no practical distinction between exchanges of any class of property when no equality money is paid. The duty is 10s. We are not ourselves satisfied that if equality money is paid there is freedom from *ad valorem* duty except in the case mentioned in section 73 of the Stamp Act, 1891.

Even apart from section 73 some exchanges at least are liable to a higher duty than the 10s. duty under the heading "Exchange or Excambion" in the Schedule to the Stamp Act. Thus, for instance:—

(a) An exchange of property for stock or securities is for stamp duty purposes a sale, though for most purposes the consideration for a sale must be cash. The special stamp duty position results from section 55 of the Stamp Act, 1891, as interpreted in *Coats* v. *I.R.C.* [1897] 2 Q.B. 423. An exchange of shares for shares is presumably two sales. In the *Coats* case the transaction was a transfer on sale in consideration of the allotment of shares and only one transaction involved the payment of stamp duty.

(b) There can be no doubt in the construction of section 74 (5) of the Finance (1909–10) Act, 1910, that conveyances to give effect to one-sided exchanges can be subject to voluntary disposition duty. Only the conveyance to the party getting the better of the bargain would be so liable.

These are two clear cases where an exchange not falling within section 73 of the Stamp Act, 1891, is none the less liable to *ad*

valorem duty. No doubt there are others. But the particular case with which we are concerned is a part exchange—which is one name for the transaction where cash is paid for equality of exchange. There would appear to be three main possible views of the stamp duty payable on a conveyance of, say, a leasehold in consideration of (i) a less valuable leasehold and (ii) a sum of cash.

View 1 is that the transaction is an exchange and the duty is 10s. in all cases. View 2 is that the transaction is an exchange to the extent that the consideration is not cash, stock or securities, and a sale as to the balance of the consideration. If this view is right the practical effect is similar to that of section 73 of the Stamp Act, 1891. View 3 is that the transaction is a sale and that as duty is leviable on the amount *or value* of the consideration for a sale, duty is payable on the cash considerations and on the value of the property consideration.

View 2 is the one that commends itself to us, and it is faintly supported by the decision in *Routledge* v. *McKay* [1954] 1 W.L.R. 615, where it was held that an agreement under which it was agreed that a B.S.A. motor-cycle should be exchanged for a Douglas motor-cycle, one party paying £30 to complete the transaction, was exempt from stamp duty as an agreement under the exemption in favour of agreements made for or relating to the sale of any goods, wares or merchandise. If this is right the note in *Key and Elphinstone* states the effect of the law correctly in relation even to exchanges of other than real property. Unfortunately there are grounds for suggesting a different view. These arise from the Scottish case of *Cormack* v. *I.R.C.* 1924 S.C. 819, where the court rejected the Revenue's claim that a particular family arrangement was a sale (*inter alia*) because a substantial (though small) part of the consideration consisted of something other than cash. It was suggested that the true question that must be asked is whether the transaction is in substance an exchange or in substance a sale. If it is an exchange View 1 will prevail; if it is a sale presumably View 3 will prevail, though the Revenue's claim in *Cormack's* case was on the basis of View 2. The decision so far as it suggests that one should look at the substance of the transaction is possibly difficult to reconcile with the usual canons of construction of taxing statutes, but it at any rate avoids the conclusion that one could escape stamp duty on the conveyance of all Lombard Street worth, say, £100,000,000 by calling it an exchange of all Lombard Street for a china orange with £100,000,000 being paid for equality of exchange. If View 2 is

right duty is clearly payable on £100,000,000. If it is not then it would be for the court to decide whether or not the transaction is in substance a sale.

J. G. M.

Housing Repairs and Rents Act, 1954, s. 23—Apportionment of Liability for Repairs

Where a landlord is seeking a repairs increase under the Housing Repairs and Rents Act, 1954, and the landlord is responsible in part only for the repair, an apportionment has to be made between the respective liabilities of the landlord and tenant to arrive at the proportion of the full repairs increase to which the landlord is entitled. The Clerkenwell County Court recently had before it a variety of tenancies of a block of flats and, by courtesy of the editor of the *Real Estate Journal*, the organ of the Association of Land and Property Owners, we set forth below the result of the applications:—

	Terms of Covenant	Percentage attributed to landlords.
A.	"During the term will keep the interior of the said premises and all landlords fixtures and fittings in good and substantial repair and condition and in such repair and condition will deliver up at the expiration or sooner determination of the term (damage by fire excepted) together with landlords fixtures and fittings which at any time during the continuation of the said term shall be erected on or used in or fastened to the demised premises and all improvements and additions thereto (damage by fire as aforesaid excepted)."	62·7
B.	"During the term will keep the interior of the said premises and all landlords fixtures and fittings in good and substantial repair and condition and in such repair and condition will deliver up at the expiration or sooner determination of the term (damage by fire excepted) together with landlords fixtures and fittings which at any time during the continuation of the said term shall be erected on or used in or fastened to the demised premises and all improvements and additions thereto (damage by fire as aforesaid excepted) provided that the	66

	Terms of Covenant	Percentage attributed to landlords.
	lessee shall pay to the lessors by way of extra rent and they shall accept in satisfaction of all claims for dilapidations then accruing consequent upon reasonable wear and tear the sum of £20 such payment to be made one month preceding the end or sooner determination of the said term."	
C.	"Throughout the said term to maintain the interior of the said premises and the said landlords fixtures and fittings (including the refrigerator) in good substantial and sanitary condition (damage by accidental fire only excepted) and at the expiration or sooner determination of the said term to deliver up the said premises together with the said fixtures and fittings in all respects in as good condition as the same now are (damage by accidental fire and fair wear and tear only accepted)."	77
D.	"To keep the interior of the said dwellingrooms and premises in good and substantial repair and condition together with all fixtures and fittings in and about the said premises and so to yield up at the end or sooner determination of the said term provided always that in lieu of the usual covenant for redecorating at the end or sooner determination of the said term the tenant shall pay to the landlords 14 days before the determination of the tenancy the sum of £14 in full satisfaction of the liability for redecorating arising from fair wear and tear such sum in default of payment to be recoverable as rent in arrear."	70
F.	"Throughout the said term to maintain the interior of the said premises and the said landlords fixtures and fittings (including the refrigerator) in good substantial and sanitary condition (damage by accidental fire and damage by water flowing from other parts of the building only excepted) and at the expiration or sooner determination of the said term to deliver up the said premises together with the said fixtures and fittings in all respects in as good condition as the	93

	Terms of Covenant	Percentage attributed to landlords.
	same now are (damage by accidental fire and damage by water flowing from other parts of the building and fair wear and tear only excepted.)"	
G.	"During the term will keep the interior of the said premises and all landlords fixtures and fittings in good and substantial repair and condition and in such repair and condition will deliver up at the expiration or sooner determination of the term (fair wear and tear and damage by fire excepted) together with landlords fixtures and fittings which at any time during the continuation of the said term shall be erected on or used in or fastened to the demised premises and all improvements and additions thereto (fair wear and tear and damage by fire as aforesaid excepted)."	93
H.	"To keep the inside of the said dwellinghouses and premises in good substantial and sanitary repair and condition together with all the fixtures and fittings in and about the said premises and at the end or sooner determination of the said term in such repair and condition to deliver up and on demand to make good any damage or want of repair caused by the neglect or default of the tenant."	62·7

It will be seen that in the case of a full repairing covenant 37·3 per cent. was allowed for the tenant's proportion but reduced to 7 per cent. in the case of a tenant who had a fair wear and tear clause. The landlord's figures were in fact accepted almost completely.

Housing Repairs and Rents Act, 1954, ss. 23 and 25—Notice of Increase where Landlord's Proportion not ascertained

Where the tenant is liable for any part of the repairs of a dwelling-house, to arrive at the actual amount of the repairs increase to which the landlord is entitled his proportion of liability must be agreed with the tenant or determined by the court. However reasonable the landlord may be, there is nothing to compel the tenant to agree with the landlord; he may sit back and wait for the landlord to go to the court in the hope that, whatever the result, he will not have to pay the increase until after the decision

of the court and the service of the statutory notice of increase. Some landlords have tried to counter this manoeuvre by serving a notice of increase showing the full repairs increase reduced by the proportion which the landlords consider to represent the amount of the tenants' responsibility.

In *Belsize Property Trust* v. *Stuttaford* [1955] 4 C.L. 347, the landlords proceeded in this way and then claimed the increased rent. The defendant contended that, as the amount to be deducted by the tenant had neither been agreed between the parties nor determined by the court, the notice of increase was invalid. The county court rejected the tenant's contention: the Act did not in terms require the determination of the tenant's proportion of liability before the notice was served; it provided for determination upon " any question arising " as to the amount of the reduction in respect of the tenant's liability, and such a question might arise after the notice was served or not at all. What would be the position if the landlord did not concede a sufficiently great proportion of liability to the tenant? Would the court exercise its power to amend the error? It seems unlikely that *Belsize Property Trust* v. *Stuttaford* can be treated as more than a trial run.

Options to Purchase

Mr. H. W. R. Wade writes: —

" Your editorial note in a previous issue (*ante*, pp. 82–3) reveals a surprising conflict of opinion on the fundamental question of the efficacy of estate contracts as interests in land.

" If I may say so, I entirely share what you and Dr. Walford describe as the generally accepted view: that a specifically enforceable option to purchase land creates an equitable interest which is enforceable against the option-giver's successors in title, provided that the perpetuity rule is not infringed (as it often may be, since options are commonly not framed with reference to lives in being); and that it is quite immaterial whether or not the option is contained in a lease. I also share your view that this is the meaning of the opening words of Romer L.J., delivering the judgment of the Court of Appeal in *Woodall* v. *Clifton* [1905] 2 Ch. 257, at p. 278. Romer L.J. indeed stated the point *totidem verbis*.

" Yet Dr. Morris and Professor Leach, whose opinions both jointly and severally command the highest respect, stated in their article (Vol. 18, at p. 579) that an option to purchase contained in a lease would never bind the lessor's assigns, since it was not within the class of covenants which ' touch and concern ' the land

and was not therefore capable of running with the land. This conclusion they draw from *Woodall* v. *Clifton* itself, since the substance of the Court of Appeal's decision was that an option contained in a 99-year lease and exercisable 'at any time during the said term' was not enforceable against an assign of the lessor since it did not relate to the subject-matter of the lease.

"Most people would, I think, reply that the proposition thus extracted from *Woodall* v. *Clifton* is correct as a statement of common law (including in that term the Statute 32 Hen. 8 and later re-enactments) but incorrect as a statement of equity. Just as a restrictive covenant will bind a tenant's successors in title in equity without regard to the common law doctrine of privity of estate, so an estate contract will, if duly registered, bind a landlord's assigns in equity even though it is not capable of running with the land at common law. If the equitable interest is one which will bind successors in title to freehold land, it can hardly fail to bind successors in title to a lease. It would be very odd if the burdens capable of running with leases and reversions were more restricted than those capable of running with freeholds. The general principle is the other way round: all incumbrances capable of running with freeholds are equally capable of running with leaseholds; but certain other burdens, for example, covenants to repair, may run with leaseholds even though not with freeholds. The fact that an option is contained in a lease surely cannot make it less capable of running with land than if it were made independently.

"The question remains, why was it that the Court of Appeal in *Woodall* v. *Clifton* dealt with the case purely under the statute of Henry VIII? If the option would run with the land in equity, why trouble to ascertain that it would not do so under the statute? This can only be understood by reference to the arguments of counsel, which fortunately are fully reported, and to the judgment of the learned judge at first instance. Warrington J. held that the option to purchase the freehold was void for perpetuity as against the lessor's assigns. But counsel had pressed him with the analogy of covenants for the renewal of leases, which are admittedly exempt from the perpetuity rule and which can admittedly run with a lessor's reversion at law. The argument, as again presented to the Court of Appeal and reported at p. 272, appears to have run as follows: (a) all covenants which touch and concern the land are exempt from the perpetuity rule; (b) an option to purchase the freehold reversion touches and concerns the land; (c) therefore such an option is exempt from the perpetuity rule. This syllogism failed in both courts, but on different

grounds. Warrington J. denied (a), the major premise, but was prepared to assume (b) for the purpose of the argument. The Court of Appeal, however, denied (b), the minor premise. But they dealt with the point in isolation, and perhaps invited misunderstanding by their statement (at p. 278) that 'unless the covenant or proviso giving the option to purchase can be said to run with the land by virtue of the provisions of the statute, then the plaintiff must fail.' What they did not add expressly, but the reporter correctly added in the headnote, was that the cause of failure was the perpetuity rule: it was not that an option duly limited as to time cannot run with the land in equity. When, therefore, Dr. Morris and Professor Leach say that an option 'can never be enforced against the option-giver's assigns, for a reason which has nothing to do with the rule against perpetuities,' they would appear to have mistaken the point decided by the Court of Appeal. It is only if the perpetuity rule *does* apply that the option fails, as the opening words of the judgment say quite clearly. There is no difficulty in fitting the Court of Appeal's decision into its place if it is remembered that they were upholding the learned judge below and dealing with only one limb of the argument presented to him."

REQUISITIONED HOUSES AND HOUSING (AMENDMENT) ACT, 1955

This Act, which came into force on June 6 (s. 20), has two principal provisions: first, a definite term is put upon the period during which houses may remain under requisition; and, secondly, owners may be asked to permit the present licensees to remain on as statutory tenants; but there is no question of compulsion: if the owner does not like the bait offered by the local authorities he may insist on having his house back. The power of the Minister of Housing and Local Government to retain possession of requisitioned houses came to an end on June 6, and the right to possession passed to the appropriate local authority (s. 1 (1)). To the owner this is a mere change of form and not substance. Sections 1 (3) and 2 make consequential provision so that substantive rights are not altered as a result of the transfer. The local authority may retain possession of requisitioned houses vested in them until March 31, 1960 (s. 1 (2)). This is a final date but the owner may regain possession before then under sections 3, 5, 6 or 7.

Section 3 covers houses which are or become vacant: the requisition ends four weeks after the licence to occupy is terminated. This is subject to a number of exceptions, the most important of which is where the Minister authorises the continued requisition. Section 5 enables the owner to apply to the court for release at any time on the ground that he requires the house for himself, his spouse or near relative. The jurisdiction of the court is similar to that under the Rent Restrictions Acts where a landlord applies for possession on similar grounds and the court cannot make an order for possession if it is satisfied that greater hardship would be caused to the licensee and persons residing with him by making the order than to the person for whom the house is required, and persons residing or proposing to reside with him by refusing to make it.

Section 6 enables an owner to make representations to the Minister for release on the ground that he will suffer severe hardship unless he can either obtain vacant possession or sell with vacant possession. The Minister may, after consulting with the local authority, order the local authority either to release the house or, at the option of the local authority, to offer to purchase

the house at a price equivalent to what would be payable on compulsory acquisition. Having regard to the fact that most local authorities have proved themselves thoroughly bad in looking after property under requisition, so that compensation for disrepair is in many cases substantial, and that there may well be considerable delay in ascertaining the amount of compensation on acquisition, an owner is not likely to get much assistance from the section. If he can persuade the local authority to release his house, he does not need to go under the section and, if he cannot, the offer of acquisition is in most cases going to be sufficient to present any owner, except one in the direst straits, from proceeding further.

Section 7 directs release where an owner wishes to improve his house with the assistance of an improvement grant and the local authority decides to give the grant. The local authority may as a condition require the owner to grant a tenancy of the house or the flats comprised therein to their nominees upon terms to be approved by the local authority; the owner may refuse any nominee in the same way as a landlord can refuse an assignee where his consent is required to assignment, that is, his refusal must be on reasonable grounds.

Section 8 provides that, except with the consent of the owner, a local authority may not release any part of a requisitioned house while retaining possession of any other part of the house, unless the part so released consists of a separate dwelling *constituted as such before the house was requisitioned.*

Section 4 deals with the invitation by local authorities to owners to accept their licensees as rent restricted tenants. The local authority may make the offer to any owner whose house is under requisition and must make it if so directed by the Minister. If the owner accepts, the licensee becomes a statutory tenant at the end of one week from the day when the next instalment of rent is due under the licence. The statutory tenancy is upon the terms that the landlord is liable for rates and to provide such services (if any) as were provided for the licensee as such by, or by arrangement with, the local authority and otherwise upon the like terms and conditions as the licence. The standard rent is at an annual rate equal to: (i) the annual rate of the rental compensation payable in respect of the dwelling immediately before the invitation was made; (ii) the statutory repairs deduction calculated as under the Housing Repairs and Rents Act, 1954; (iii) the rates payable in respect of the dwelling at the time of the invitation; and (iv) the annual cost at the time of the invitation in providing

the services. This standard rent is deemed to have been fixed by a letting commencing immediately before September 1, 1939, but the landlord is not to be entitled to the 40 per cent. increase under the 1920 Rent Restrictions Acts.

The owner will have to consider whether he would prefer to await vacant possession or take on the licensee, and a great deal will turn on the compensation he is being paid for the requisition. Under the Compensation (Defence) Act, 1939, as amended by the Requisitioned Land and War Works Act, 1945, he is supposed to be getting the full rental value, but if the property is rent-restricted the rental compensation is subject to a limit of the maximum rent which would have been recoverable under the Rent Restrictions Acts. As the requisitioning authority is, in theory, liable for repairs, the owner will be entitled under the above formula to a repairs increase under the 1954 Act. If the property is rent-restricted and the owner intends to let it anyway, he is probably well advised to accept the invitation, but if it is not he may care to await vacant possession and fix his own rent, bearing in mind that in such a case the tenant could apply to a rent tribunal under the 1949 Act to determine whether the rent was reasonable and that he will lose the compensation payable.

If the invitation is accepted the compensation payable is at such rate as may be specified in the notice of invitation, being a rate determined by the Minister with the consent of the Treasury, not to exceed that prescribed by statutory instrument. It is to be calculated by reference to the aggregate of the rental compensation payable in respect of the dwelling for the year ending with the date on which notice of invitation was given, to the nature of the owner's interest in the dwelling and (in such cases as may be so determined) to the character of the dwelling. No order specifying the rate has yet been made.

Down to the end of March, 1965, the licensee or his statutory successor will not have to pay to the landlord more than the rent payable under the licence, except so far as the local authority otherwise determine, and the balance of the rent will be payable by the local authority.

POSITIVE COVENANTS AND THIRD PARTIES

Williams v. *Unit Construction Co., Ltd.*

(An unreported decision of the Court of Appeal)

We set out below an interesting letter we have received on the above subject, to which we append a full report of the decision to which our correspondent refers.

To the Editor,
The Conveyancer & Property Lawyer.

Dear Sir,

My attention has just been drawn to an article on Positive Covenants in Conveyances in *The Conveyancer,* Vol. 18, p. 546. The author refers to the case of *Smith* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, and expresses anxiety as to the effect of the decision upon conveyancing practice, having regard to the fact that sections 78 and 79 of the Law of Property Act, 1925, respectively, pass the benefit and the burden of a covenant relating to land to the successors in title of the covenantee "and the persons deriving title under him or them."

Two or three years ago I had to argue in the Court of Appeal the (unreported) case of *Williams* v. *Unit Construction Co., Ltd.* I pointed out to the Court of Appeal the effect of the decision in the *Catchment Board* case by references to section 79, and satisfied them that, having decided that persons deriving title under covenantees included tenants for the purposes of section 78, they must also include tenants for the purposes of section 79; so that they had deprived the conveyancing practice of some generations of all meaning and effect. In particular, I pointed out that a person who became a mortgagee of leaseholds by sub-demise, would be directly liable to the lessor on the covenants in the lease, though it had been assumed in the past that, having no privity of estate with the lessor, he could not be sued upon those covenants. The court, before which I was arguing, contained two of the Lords Justices who had been concerned in the *Catchment Board* case, namely, Tucker and Singleton L.JJ.; and Tucker L.J. who presided, admitted that, when the *Catchment Board* case was being argued before them, their attention was not drawn to section 79. I did not reply that I was not surprised at this. But, as all three members of the court and all four counsel who appeared before them had practised only in courts of common law, it was not surprising that none of them should have been aware of the long established assumption of all conveyancers that an underlessee had neither rights nor obligations towards the head lessor under the positive covenants in the head lease. It seems, however, to follow inevitably from the decision in the *Catchment Board* case on section 78 that, under section 79, a covenantee can now sue a mortgagee of leaseholds (or freeholds) upon positive covenants, even though he has no privity of estate with him.

This curious position had arisen out of the use by the draftsman of the Law of Property Act of the expression "persons deriving title under him or them," which, so far as I know, does not occur in any other conveyancing statute. I had supposed that by "successors in title" the draftsman meant persons who succeeded by operation of law, his personal representatives and trustees in bankruptcy, and by "persons deriving title under him or them" persons who acquired the estate of the covenantee

by assignment. But the Court of Appeal in the *Catchment Board* case seemed to have decided that "successors, etc.," means all persons acquiring the estate of the covenantee, and that "persons deriving, etc.," means anybody, even a tenant at will, whose interest in the land concerned depends in any way upon that of the covenantee or his assignees. In the case in which I was concerned, the plaintiff, who succeeded in the Court of Appeal as in the court below, was a weekly tenant of the lessee of a house; and the defendants, who lost in both courts, were contractors who had covenanted with the plaintiff's landlord to maintain the footwalk in front of his house in good condition until it was taken over by the local authority. So far as I am aware, no one has yet tried to enforce a positive covenant against a mortgagee by demise or sub-demise. But I await that event with some eagerness. And I shall be interested to see what a Court of Appeal containing two equity judges will make of the *Catchment Board* case when it is cited to them.

Yours, etc.,

W. Lyon Blease.

Liverpool, May 17, 1955.

Williams v. Unit Construction Co., Ltd.

Court of Appeal

Lord Tucker, Singleton and Morris L.JJ.
May 23, 1951

Covenant running with the land—"successors in title and the persons deriving title under him or them"—sublessees included—liability of sublessees as "successors in title" on covenants in the lease—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 78, 79.

By a document to which the parties were (1) the lessors, (2) a building construction company (the defendants in the action) and (3) the lessee, the defendants covenanted with the lessee to make up the roads and footpaths abutting on and co-extensive with the demised premises ready for adoption by the local authority and to maintain the same in proper condition until so adopted. One of the houses built upon the demised premises was sublet by the lessee to the plaintiff as a weekly tenant. The plaintiff suffered personal injury as a result of the footpath adjoining her house being in a condition of disrepair as a result of a breach of the defendants' covenant. She sued the defendants and was awarded damages by Lynskey J. The defendants appealed. *Held,* dismissing the appeal:—

(1) The covenant was a covenant running with the land and not a mere personal indemnity against liability for road charges.

(2) The plaintiff, as sublessee, was a person "deriving title" under the covenantee.

(3) In view of the judgments in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, it was not open to the defendants to contend in the Court of Appeal that section 78 of the Law of Property Act, 1925, is designed to include only persons who succeed to the whole interest of the covenantee either by operation of law or by assignment.

(4) No opinion need be expressed with regard to the argument that if a sublessee comes within the words "successors in title and the persons

deriving title under him or them" in section 78 (which deals with the benefit of covenants relating to land) he must also come within the identical words in section 79 (which deals with the burden of covenants relating to land), it being observed that this argument was not raised in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board.*

APPEAL from Lynskey J.

The facts are fully set out in the judgment of Lord Tucker.

W. Lyon Blease for the appellants (the defendants in the action).
E. E. Youds for the respondent (the plaintiff in the action).

Lord Tucker. This is an appeal from a judgment of Lynskey J. given on November 10, 1950, at the Liverpool Assizes, in which he awarded the plaintiff, Mrs. Williams, the sum of £775 damages for personal injury which she had suffered as the result of an accident on the footpath adjoining her house. When I say her house I mean the house of which she was the weekly tenant. There is no dispute with regard to the facts. The pavement was in a condition of disrepair and as the result thereof the plaintiff suffered these injuries.

The action was brought against the defendants, the Unit Construction Co., Ltd., on the ground that the injuries which the plaintiff suffered were the result of a breach by the defendants of a covenant which they had entered into in a document described as an underlease, made on July 4, 1940, to which document the parties were Alfred Booth & Co., Ltd., who were thereinafter referred to as the lessors, the present defendants, the Unit Construction Co., Ltd., and one Robert Alfred Colby Cubbin, who was described as the lessee. By that covenant in that document the Unit Construction Co., Ltd. covenanted as follows with the lessee, that is Mr. Cubbin, that they, the vendors, as they were called in that document, "will within six calendar months from the date hereof complete or procure the completion of the roads and footpaths abutting on and co-extensive with the premises hereby demised ready for adoption by the Liverpool Corporation and will then maintain the completed road in proper condition until adopted." It is not disputed that the condition of the footpath at the material date was such as to constitute a breach of that covenant by the Unit Construction Co., Ltd. The point which is taken is, it is said, that Mrs. Williams is not entitled to the benefit of that covenant, and accordingly not entitled to maintain this action against these defendants. Mrs. Williams comes into the matter in this way. Alfred Booth & Co., Ltd., who, as I have

said, were described as the lessors in that underlease, had purchased a building estate near Liverpool, and by this underlease they leased for 999 years to Mr. Cubbin four plots on this estate. They had arranged with the Unit Construction Co., Ltd., to build houses on those plots. There were four plots, each containing two houses. The Unit Construction Co., Ltd., were to be remunerated for the building of the houses, and that was provided for under this underlease; they were to receive £3,900. They joined in the underlease so as to give effect to this clause 4, which I have read. Mr. Cubbin having acquired that interest in the property, let one of these houses, No. 117 Barford Road, to Mrs. Williams as a weekly tenant. She says: "This pavement outside my house was not maintained in accordance with that covenant. I have suffered injury and I am entitled to recover damages." She can, of course, only do so provided that the covenant is one which runs with the land and so entitled her to the benefit of it.

The first point taken before Lynskey J. and really, I think, the only point seriously argued before him, was that this covenant was not one which ran with the land. Lynskey J. rejected that contention and said this: "The effect of this covenant says Mr. Blease "—who was arguing, and has argued the case before us on behalf of the defendants—" is, in effect, to give an indemnity to Mr. Cubbin against his liability for roadmaking charges, but Mr. Blease says that that is only a personal liability, and that if Mr. Cubbin sells his property and he sells it without that covenant, then the person purchasing would not obtain the benefit of it, and therefore would have to pay the roadmaking charges so far as adoption is concerned. If that covenant runs with the land without assignment, then of course the value of the land remains as value without liability for road charges. If the covenant does not run with the land then the purchaser would take the land subject to a liability for the road charges, and, therefore, would get land which was of less value, and certainly of less value in the market, than if the covenant applied. It seems to me that this is a covenant which affects the value of the land in the hands of the occupier, and, therefore, it is a covenant which comes within the test which is laid down by Bayley J. in *Congleton Corporation* v. *Pattison* (*a*) and which was adopted by me in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* (*b*)." That contention is again put before us in perhaps a slightly different form.

Mr. Blease referred to a passage in the judgment which I gave in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment*

(*a*) (1808) 10 East 130, 135.
(*b*) [1949] 2 K.B. 500, 507.

Board (*c*), where (I think basing myself upon what had been earlier said by Bayley J. in the *Congleton Corporation* case), I said: "It is first necessary to ascertain from the deed that the covenant is one which 'touches or concerns' the land, that is, it must either affect the land as regards mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land, and it must then be shown that it was the intention of the parties that the benefit thereof should run with the land." Mr. Blease, emphasising those last words, that it was the intention of the parties that the benefit thereof should run with land, says with regard to this covenant, that the real intention of a covenant of this kind inserted in an agreement of this kind is to save the owner of the property or the person who is the owner within the meaning of the Public Health Act, or similar statutes, from liability for paying the cost of making up roads which are subsequently adopted by the local authority. He says that that was the object of the clause. This clause may have that result amongst other results, but, as Mr. Youds points out, it would have been very easy to insert a covenant indemnifying Mr. Cubbin if that had been the only intention. In my view the words in their natural meaning are clearly designed to confer benefit on the occupiers of all houses, including Mrs. Williams, which abutted on these roads and footpaths. It must not only enhance the value of the land but increase the amenities of it for someone to have a properly made up road and footpath abutting on his premises. Roads often remain unmade up and in a ruinous state for many years and it must be a great benefit to a tenant if he is living in a house where throughout the period prior to adoption it has been properly made up and kept in repair under a covenant of this kind. I think this covenant is one which clearly relates to the land of the covenantee within the meaning of section 78 of the Law of Property Act, 1925, and was intended to enure for the benefit of Mrs. Williams.

A further point has been taken by Mr. Blease, one which I do not think was taken before Lynskey J., although it may have been adumbrated. It certainly was not dealt with by Lynskey J. in his judgment, but we have allowed Mr. Blease to raise it as it is intimately connected with the first point. It is a pure point of law so that Lynskey J.'s decision could not have been affected by the calling of any further evidence. The point is this: Mr. Blease says that Mrs. Williams is not a person deriving title under Mr. Cubbin within the meaning of section 78. Section 78 (1) reads

(*c*) *Ibid.* at p. 506.

as follows: "A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed. For the purposes of this subsection in connection with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited." Subsection (2) says: "This section applies to covenants made after the commencement of this Act, but the repeal of section fifty-eight of the Conveyancing Act, 1881, does not affect the operation of covenants to which that section applied." Mr. Blease says that "persons deriving title" under the covenantee means persons who have acquired the whole interest of the covenantee in the land in question and that the phrase "successors in title and the persons deriving title under him or them," is designed to include only persons who succeed to the whole interest of the covenantee either by operation of law or by assignment, and that they do not include sublessees. That is obviously a point of considerable importance, but, in my view, Mr. Blease cannot rely upon that contention in this court because we are bound by the decision of this court in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*, to which I have already referred. In that case one of the plaintiffs, a company, was a tenant of the land in question which had been damaged by flooding, and although the main argument in that case was devoted to the question as to whether or not the covenant in question ran with the land, it did become necessary to consider the effect of section 78 of the Law of Property Act, 1925, so far as the claim of the company in that case was concerned. It is quite true that Mr. Nield, who appeared for the defendant in that case, did not press this point, but it fell to be dealt with. I dealt with it myself and said this (*d*): "I have accordingly arrived at the conclusion that the covenant by the board in the agreement of April 25, 1938, is one which runs with the land referred to therein, which land is capable of identification, and that it is binding on the defendant board; and, further, that by virtue of section 78 of the Law of Property Act, 1925, it can be enforced at the suit of the covenantee and her successors in title and the persons deriving under her or them, so that both the plaintiff Smith and the plaintiff company can sue in respect of the damage resulting to their respective interests therein by reason of the defendants' breach of covenant." Somervell L.J. referred to the matter and said (*e*): "On the basis

(*d*) [1949] 2 K.B. at p. 509.
(*e*) *Ibid.* at p. 512.

that the benefit of the covenant ran with the land, Mr. Nield did not argue that the cause of action was restricted to the first plaintiff." Denning L.J. dealt with this point more fully, and having dealt with the history of the matter, said (*f*): "If a successor in title were not allowed to sue it would mean that the covenantor could break his contract with impunity, for it is clear that the original owner, after he has parted with the land, could recover no more than nominal damages for any breach that occurred thereafter. It was always held, however, at common law that, in order that a successor in title should be entitled to sue, he must be of the same estate as the original owner. That alone was a sufficient interest to entitle him to enforce that contract. The covenant was supposed to be made for the benefit of the owner and his successors in title, and not for the benefit of anyone else. This limitation, however, was, as is pointed out in Smith's *Leading Cases* (*g*), capable of being 'productive of very serious and disagreeable consequences,' and it has been removed by section 78 of the Law of Property Act, 1925, which provides that a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title, 'and the persons deriving title under him or them' and shall have effect as if such successors 'and other persons' were expressed." As I have said, I think we are clearly bound by that decision and that the point is not open to Mr. Blease in this court.

I would only add that Mr. Blease did advance an interesting argument upon this point which was not addressed to this court in the *River Douglas Catchment Board* case, namely, that if the same meaning is to be given to the words "successors in title and the persons deriving title under him or them" in section 79, which is a section dealing with the burden of covenants relating to the land, serious consequences might follow by making sublessees liable for the covenants which had been entered into by their lessors. I express no view with regard to section 79. It has been pointed out that it is a section dealing with burdens as distinct from benefits, and that it also contains the words "unless a contrary intention is expressed." I merely mention the point for the purpose of indicating that we were referred to that section and it appeared that that aspect of the matter was not brought to our notice in the *River Douglas Catchment Board* case. However that may be, I feel we are bound by the decision in the *River Douglas Catchment Board* case, and for the reasons I have given I think this appeal must be dismissed.

(*f*) *Ibid.* at p. 516.
(*g*) 1 Sm.L.C. (13th ed.) 75.

Singleton L.J. I agree that the appeal should be dismissed. The main submission of Mr. Blease as put before this court yesterday was this. He said: "I do not now contend that a covenant such as this does not run with the land for the benefit of a person who acquires the whole estate of the original covenantee, but I submit that a person who is only a lessee of that covenantee is not entitled to the benefit of the covenant." He agreed that that proposition was not really argued before the learned judge, though the judge had dealt with the question as to whether or not the covenant ran with the land.

Upon the main point raised by Mr. Blease in this court I agree that we are bound by the decision of this court in the case of *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*. The defendants in this case are described in the underlease as the vendors, and they covenant with the lessees that they, the vendors, " will within six calendar months from the date hereof complete or procure the completion of the roads and footpaths abutting on and co-extensive with the premises hereby demised ready for adoption by the Liverpool Corporation and will then maintain the completed road in proper condition until adopted." The lessee was Robert Alfred Colby Cubbin. Mr. Cubbin in due course let the house, No. 117 Barford Road, to the plaintiff in the action. She was a weekly tenant of the lessee. In my view she was a person deriving title under him.

In the case of *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* an agreement had been made between the Catchment Board and Mrs. Ellen Smith, who, at the time of the agreements, was the owner of certain land liable to flooding. Work was done by the Catchment Board under an agreement on the lines of a plan prepared by their engineer, and it was practically completed by August 12, 1940. " On April 1 of that year the first plaintiff, John Bruce Smith, took a conveyance from Mrs. Ellen Smith of her land, which was expressly stated to be conveyed with the benefit of the agreement of April 25, 1936. In May, 1944, the second plaintiffs, a company controlled by the first plaintiff, was incorporated and occupied the land in question under an oral agreement as yearly tenants." I mention those facts in order to emphasise that which my Lord has already said, that this very point was before the court in the year 1949 when the case of the *River Douglas Catchment Board* was considered. The plaintiff who had suffered the major damage was the company which was carrying on the industry of farming. Farm land and agricultural produce had been damaged by the failure of the Catchment Board to do that which they ought to have done. It was held that both

plaintiffs were entitled to recover damages. It is true that the submission on behalf of the Catchment Board that the plaintiff company could not recover was not pressed, but the point was before the court. It was considered and mentioned in the judgments of the Lords Justice, particularly Denning L.J., who cited the passage from Smith's *Leading Cases* which has been read to this court. In those circumstances I do not think the point which Mr. Blease raises is open to this court.

Mr. Blease raised a further matter this morning to the effect that the plaintiff was not entitled to the benefit of the covenant. He submitted that the object of the covenant was to avoid the other parties to the underlease, Alfred Booth & Co., Ltd., being responsible for roadmaking charges; and it was not a covenant entered into for the purpose of benefiting the occupier of any one of the houses embraced in the underlease. There were eight houses mentioned in the underlease including the one occupied by the plaintiff. The terms of the covenant that the vendors will complete "the roads and footpaths abutting on and co-extensive with the premises hereby demised" seem to me intended to be for the benefit of occupiers of the houses comprised in the underlease. The fact that the purpose of the covenant may also relieve someone else from paying money is neither here nor there. The object of roadmaking and of the making of footpaths was for the benefit of the occupiers of the houses, and that point also fails.

For these reasons I agree that this appeal must be dismissed.

Morris L.J. I am in agreement with the judgments which have been delivered.

Appeal dismissed with costs.
Leave to appeal refused.

Solicitors—Herbert Smith & Co., for Samuel Dean & Co., Liverpool, for the appellants (defendants); Helder, Roberts & Co., for Behn, Twyford & Reece, Liverpool, for the respondent (plaintiff).

[The foregoing report was prepared by John Burke, Barrister-at-Law, from a transcript of the shorthand notes of the Association of Official Shorthandwriters; revised by W. Lyon Blease, Barrister-at-Law.]

COMPULSORY PURCHASE PROCEDURE AND DISPUTED OWNERSHIP

By J. B. Sweetman, ll.b., Solicitor

It is hardly controversial to say that existing procedure for the acquisition of land by the Crown and other public authorities is antiquated and clumsy, and complicated by an almost infinite variety amongst the provisions of the many Acts which enable such acquisitions to be made. There may well be some who feel that the more difficult it is for the authorities to make use of the procedure, the less they will do so, and that a public benefit will result indirectly. But this is to ignore the fact that the difficulties and delays inherent in the present procedure usually mean, in the long run, delay, embarrassment and often financial loss to the landowner, apart altogether from additional burdens on the taxpayer. As an illustration of the sort of way in which the existing procedure works, it may be useful to examine the example of a purchase of land apparently vested in a Settled Land Act tenant for life, but to which a third party lays claim—a claim sufficiently supported by occupation and by the parcels in his title deeds to have a reasonable chance of success.

The first question to arise is that of the power of the tenant for life to sell and of the public authority to buy and the machinery for so doing. There is no great difficulty about the power of the tenant for life to sell, since the general power given to him by section 38 of the Settled Land Act, 1925, will cover the point, provided that the sale is made for the best consideration in money that can reasonably be obtained (s. 39 (1)). As to the power of the authority to buy, this may depend upon any one of a number of general Acts, or upon a special Act. But, apart from the special (though by no means uncommon) case of acquisition by Service Departments under the Defence Acts, it will almost inevitably be found that the Act or Order giving power to purchase ultimately refers for the machinery of purchase back to the Lands Clauses Consolidation Act, 1845, as amended, and subject to modifications also set out or referred to in the enabling Act or Order. For instance, where any land is designated by a development plan under the Town and Country Planning Act, 1947, as subject to compulsory acquisition by a local authority, the county council or county

district council may be authorised by the Minister in certain circumstances to acquire that land compulsorily (s. 38 (1) of that Act). By section 38 (4), the Acquisition of Land (Authorisation Procedure) Act, 1946, is to apply to the compulsory acquisition of land under that section (except for section 2 of that Act). Moreover, under section 40 (1) of the Town and Country Planning Act, 1947, certain local authorities are given power to acquire by agreement any land required for any purpose for which a local authority may be authorised to acquire land compulsorily under section 38 of the Act; and in that case it is specifically provided by section 40 (2) that the Lands Clauses Acts (except the provisions relating to the purchase of lands otherwise than by agreement and the provisions relating to access to the special Act and except sections 127 to 132 of the Lands Clauses Consolidation Act, 1845) are to be incorporated with that section, which is deemed to be the special Act in construing those Acts. Thus, in the case of a purchase by agreement, we have already arrived back at the Lands Clauses Acts; in the case of compulsory purchase, there is a further link in the chain—the Acquisition of Land (Authorisation Procedure) Act, 1946. Turning to this, it is found that section 1 (1) provides for the making of compulsory purchase orders in accordance with the provisions of the First Schedule to that Act; and section 1 (3) provides that in relation to any compulsory purchase to which the First Schedule applies, the Lands Clauses Acts and other enactments mentioned in Parts I and II of the Second Schedule to the Act shall be incorporated in accordance with the provisions of the said Parts I and II (which contain detailed modifications of the provisions of the Acts referred to); and the Acquisition of Land (Assessment of Compensation) Act, 1919, shall have effect subject to the provisions of Part III of the Schedule (which also contains specific modifications). So once again, we are back to the Lands Clauses Acts (meaning thereby the 1845 Act as amended by the Acts of 1860, 1869, 1883 and any other Acts amending them—Interpretation Act, 1889, s. 23), with the addition of the Acquisition of Land (Assessment of Compensation) Act, 1919 (which in effect substitutes arbitration by an Official Arbitrator for assessment of compensation under the Lands Clauses Act provisions in the case of purchases by public authorities; and is itself amended by the Lands Tribunal Act, 1949, which substitutes the Lands Tribunal for the Official Arbitrator).

The writer makes no apology for having indulged in the catalogue of statutes contained above; the whole point is that anybody affected by a purchase or proposed purchase by a public authority

must wallow in a morass of antiquated, confusing and piecemeal legislation in order to discover (if he can) what are his rights and what he can and should do about securing them. Indeed, there are almost inevitably many other statutory provisions to be borne in mind, *e.g.*, generally, the provisions of Part V of the Town and Country Planning Act, 1947, and Part III of the Town and Country Planning Act, 1954; and sometimes clauses of the Railways Clauses Consolidation Act, 1845, as to minerals, incorporated by a compulsory purchase order under the provisions of the Second Schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946. Even the Landlord and Tenant Act, 1954, may have its bearing (see section 39 as to compulsory acquisition of tenancies from year to year or less).

If there were no third parties claiming title, however, and provided that the tenant for life was duly co-operative, the process would go on quite smoothly, as it does in the majority of cases. In practice, whether or not notice to treat had been served, the council and the tenant for life, or their respective advisers, would discuss the purchase-money or compensation on the basis applicable under the various statutory provisions applicable to a compulsory purchase, and agree upon a figure. Then, whether notice to treat had or had not been served, the tenant for life would convey under the power given to him by the Settled Land Act, 1925, and the money would be paid to the trustees of the settlement. It should be pointed out that this is quite a different method from that which was contemplated by, and provided for, in the Lands Clauses Consolidation Act, 1845. That Act contained provisions enabling a tenant for life (*inter alios*) to sell and convey by agreement (s. 7) and for assessment of the compensation in such a case (s. 9). (The latter section now seems to be inapplicable as the tenant for life now has power to sell otherwise than under the provisions of the Lands Clauses Acts.) It also provided (ss. 18 *et seq.*) the procedure for compulsory purchase, commencing with service of notice to treat and proceeding with the assessment of compensation by arbitration or by a jury. Moreover, on payment into the Bank of England of the purchase-money agreed or awarded to be paid, it placed the tenant for life under an obligation to convey (s. 75). The form of conveyance might be according to the forms in the Schedules to the Act or as near thereto as the circumstances of the case would admit, or by deed in any other form which the promoters of the undertaking thought fit (s. 81). No doubt the usual conveyance under the Settled Land Act power complies with the latter requirement; but any protection for the purchaser

against incumbrances on the title must in that case be derived from the provisions of the Settled Land Act, 1925 (s. 72 (2)), and the covenants for title (if any) given or implied under section 76 of the Law of Property Act, 1925, and not from the Lands Clauses Acts, since the protective provisions contained in section 81 of the 1845 Act only apply where the conveyance is made according to the outdated forms in the Schedules to the Act or as near thereto as the circumstances will admit and the Settled Land Act conveyance can hardly be said to fall within that category.

In fact, the Lands Clauses Act provisions are in such a case barely operated at all.

But where compensation cannot be agreed, where the true ownership of the land cannot be readily established, or where the owner is obstinate and will not co-operate at all, there the machinery of the Lands Clauses Acts must be resorted to. And there it is that it is discovered just how cumbersome and creaky it is; and how much it has become confused by the substitution here, there and everywhere of different new processes, and the omission of bits of the machinery which proved inconvenient of operation, until the whole Heath Robinson structure appears about to collapse or disappear mysteriously within itself.

To continue with the example mentioned, the position is complicated by the existence of rival claimants to the title. It might be expected that a quick reference to the Lands Clauses Acts would reveal some straightforward method of enabling the purchaser to have the rights of the respective claimants settled and get rid of the whole affair; or at least to deposit an amount equivalent to the value of the land and leave the parties to fight it out at their leisure. But such is not the fact. At first glance, sections 76 to 79 of the 1845 Act appear to have been designed to provide a means of overcoming the difficulty; but, whether rightly or not, these sections have received an interpretation which restricts their application severely. The general purport of the sections appears from the marginal notes as follows:—

Section 76—Where parties refuse to convey, or do not show title, or cannot be found, the purchase-money to be deposited.

Section 77—Upon deposit being made a receipt to be given, and the lands to vest upon a deed poll being executed.

Section 78—Application of moneys so deposited.

Section 79—Party in possession deemed to be the owner.

The whole issue really turns on section 76, which reads as follows:—

> "If the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuses to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear on the inquiry before a jury as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank, in the name and with the privity of the accountant general of the Court of Chancery [now the Accountant-General of the Supreme Court: see the Supreme Court of Judicature (Consolidation) Act, 1925] to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands, (describing them, so far as the promoters of the undertaking can do) subject to the control and disposition of the said court."

On the face of it, the section might be thought to fit perfectly the present case, in which the tenant for life, on the one hand, and the third party on the other, have both lodged claims but failed to satisfy the purchasing authority of their respective titles. But in the leading case of *Douglass* v. *London & North Western Ry.* (1857) 3 K. & J. 173 it was clearly laid down that the section is not intended to settle the difficulty of a complete lack of title, in spite of its wording. The judgment of Sir W. Page Wood V.-C. is so much to the point that it really demands an extensive quotation:

> ". . . At first, I was struck with the observation that, in the first of the three cases, for which the legislature provide by the 76th section, they expressly mention the case of a person who, although he has made a sale, has failed to make out a title to the satisfaction of the promoters of the undertaking, from which it was argued, that the legislature may even have gone so far as to contemplate the case of a sale by a person having a positively bad title, and may have intended to provide that, even upon such a sale, the promoters of the company, not being satisfied with

the title, should be at liberty to deposit the purchase-money to the credit of the vendors, of any other person whom they believe to be interested (describing them so far as they can do) and of all other persons who may have that title which the Vendor has failed to show.

"But I think that cannot be the true construction of the section, for this reason: it is impossible to suppose that the legislature could ever have contemplated that a person having a positively bad title, and who is merely in possession of land, should be at liberty, by his own agreement, to sell that land and to fix the price, adversely to another who may possibly be in a position to recover in ejectment the very next day. It is impossible to suppose that the legislature could ever have intended that such a person, having a bad title, and being merely in possession, should be entitled to contract on behalf of the true owner to sell the lands, and yet they should have omitted to insert in the Act a special clause to that effect.

"The sounder construction, therefore, appears to me to be that, where a party in possession has shown a bad title, and the true owner cannot be found, the legislature intended the promoters of the undertaking to have recourse to the jury clauses of the Act: they are to have an inquiry before a jury and the true owner having been summoned, and failing to appear on such inquiry, the 76th section provides that it shall be lawful for the promoters to deposit the purchase-money in the Bank, to the credit of such owner (describing him as far as they can do), and upon their so doing and executing a conveyance to themselves under the 77th section, all his estate and interest will vest absolutely in them, and as against such owner they will be entitled to immediate possession.

"What, then, is the class of case which the legislature had in contemplation in making the provision for the event of an owner of lands failing to make out a title to the satisfaction of the promoters? The 7th section provides that it shall be lawful for all parties being seised, possessed of, or entitled to any such lands as therein mentioned, or any estate or interest therein, to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose, whether they be trustees (amongst other instances there specified) or feoffees in trust for charitable purposes, and so on. Those, therefore, are the persons referred to in the 76th section as the 'owners' of lands to be taken or of any interest therein. The 'owner' must have some title. Now suppose the land in the hands of such an owner to be subject to dower, or to a rentcharge

by way of jointure, or to any other independent estate or interest outstanding in a third party, who is under no legal or equitable obligation to concur in the sale but which does not displace the owner's title. . . . In such a case, the 76th section comes in to their aid; the party seised is enabled to sell, the promoters of the company are empowered to deposit the purchase-money to his credit, and to the credit of the doweress, jointuress, or other third party, and by so doing, they obtain a clear title in respect of all their estates and interests . . ."

It will be observed that the difficulty is overcome where what the learned judge described as a "positively bad title" is made out by one claimant, and nobody else turns up as a claimant. (The "jury clauses" are now practically moribund, having by the combined effect of the Acquisition of Land Act, 1919, and of the Lands Tribunal Act, 1949, been replaced by a hearing by the Lands Tribunal where public authorities or statutory undertakers are the purchasers.) But how often is it possible to say confidently that a claimant has a "positively bad" title, *i.e.*, no shadow of title at all? The purchasing authority will rarely feel able to act on the assumption that they can safely, of their own accord, rule out the possibility of a claimant establishing title. And, unless they can do so, they cannot validly operate the machinery of section 76, or of section 77. Nor does section 79 (which creates a presumption that persons in possession as owners or in receipt of the rents and profits are lawfully entitled to the lands, until the contrary be shown to the satisfaction of the court) protect the purchaser. Unless section 76 has been validly applied, section 79 has no application. *Douglass* v. *London & North Western Ry.* (*supra*) really establishes that, if nobody with a genuine claim at all turns up, or if the only adverse claimants are persons claiming to be entitled to incumbrances rather than to title, sections 76 and 77 are applicable; but in the case of a genuine dispute between two or more persons as to title, the 1845 Act provides no specific solution. The question of title cannot be decided by the jury nor by the Lands Tribunal as its successor. This appears from the judgment of the majority of the court in *R.* v. *London & North Western Ry.* (1854) 3 E. & B. 443, a case which was actually concerned with the provisions of section 68 of the 1845 Act as to "injurious affection." Here again, title has to be proved; and the judgment contains the following passage:

". . . The section [s. 68], it will be observed, is silent as to all particulars after the issuing of the writ [for summoning a jury]: and, if we refer back to the previous sections, from the 41st to the

50th inclusive, which provide for the proceedings before the same tribunal in respect of the purchase and taking of lands, it will be found that, although the verdict and judgment are made records, they are not made records of any superior court; nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that an action must be resorted to for recovering the amount; and assuming that the sheriff's jury have no jurisdiction to try the title to compensation, that question will come to issue upon the trial of that action . . ."

It was held accordingly that a jury under section 68 of the 1845 Act had no power to inquire into the right of the claimant to a right of way, but must assess compensation upon the assumption that it existed; and the same applies to the purchase of land under the earlier sections (*Brierly Hill Local Board* v. *Pearsall* (1884) 9 App.Cas. 595; *Campbell* v. *Mayor, etc., of Liverpool* (1869) L.R. 9 Eq. 679). Thus, under the old jury procedure, the purchasing body's correct stand was to have the compensation assessed on each claim (on the assumption that the claimant had title), and then to leave the claimants to bring actions to enforce the award, on which the question of title could be raised and decided by the court. The old procedure has, however been replaced by a hearing by the Lands Tribunal, as mentioned above, under the combined effect of the Acquisition of Land (Assessment of Compensation) Act, 1919, and the Lands Tribunal Act, 1949. An award by the Lands Tribunal may by leave of the High Court or a judge be enforced in the same manner as a judgment or order to the same effect (section 26 of the Arbitration Act, 1950, applied by rule 35 of the Lands Tribunal Rules, 1949). But it is unlikely that leave would be given in the case of a disputed title. In that case, the remedy would still be an action to recover the purchase-money, and the question of title would then be decided by the court.

There is, however, another, and probably more convenient, way of settling the matter. Section 6 of the 1919 Act gave power for the official arbitrator to state, at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and to state his award as to the whole or part thereof in the form of a special case. It was held in *Goodwin Foster Brown, Ltd.* v. *Derby Corporation* [1934] 2 K.B. 23 that under that provision the official arbitrator was entitled to state his award in the form of a special case raising the question what is the title or interest of the person claiming the compensation. And although section 6

of the 1919 Act is repealed by the Lands Tribunal Act, 1949, section 21 of the Arbitration Act, 1950 (applied to awards by the Lands Tribunal by section 31 of that Act), is in similar terms, and it seems clear that the Lands Tribunal can (and indeed should) state its award in the form of a special case where there is a dispute between rival claimants as to title. (It is presumed that, where there are rival claimants, the Lands Tribunal will wherever possible consolidate the references under the provisions of rule 23 of the Lands Tribunal Rules, 1949.) So that, once again, the question of title will ultimately be decided by the court.

It is hoped that enough has been said to show what complications and unsatisfactory methods are involved in solving what should be a straightforward point on compulsory purchase procedure. Reference was made early in this article to the Defence Acts; and it must be emphasised that these Acts have complications and procedures entirely of their own, if anything more antiquated than those of the Lands Clauses Acts, and considerably more arbitrary. As the Defence Acts, 1842 to 1937, are those normally used by all the Service Departments and the Ministry of Supply, and as they are incorporated by sections 32 *et seq.* of the Requisitioned Land and War Works Act, 1945, they are of very general application.

The case for modification and consolidation of all statutes laying down compulsory purchase procedure is surely overwhelming.

AGGREGATION AND SMALL ESTATES

ESTATE DUTY

By George C. Mason, Barrister-at-Law

Death After Finance Act, 1894

The original provisions concerning the exemption from aggregation of small estates were contained in section 16 (3) of the Finance Act, 1894, as that section was first enacted. It was provided that, when the net value of the property passing on the death of the deceased, upon which estate duty was payable, exclusive of property settled otherwise than by the will of the deceased, did not exceed £1,000, such property should not be aggregated with any property settled otherwise than by the will of the deceased. If, therefore, on A's death there passed free property, valued at £950, and settled property, valued at £2,000, aggregation was not effected as between the free and settled property, and each estate bore its appropriate duty as an estate by itself.

The section 16 (3) above mentioned has been replaced by a further section 16 (3) enacted by the Finance Act, 1946, which was itself replaced by a further section 16 (3) enacted by the Finance Act, 1954.

A principle established by the original section 16 (3) remains valid at the present time. That principle is that any non-aggregable property, passing on the death, must be computed in ascertaining whether the small estate limit is exceeded or not. For example, there passes on A's death:—

Free property (the small estate)	£950
A non-aggregable policy	£200
Settled property	£2,000

In this case, aggregation is effected between the free property and the settled property because the policy, although non-aggregable, must be taken into account in ascertaining whether the small estate limit is exceeded or not. The addition of £200, in respect of the policy, to the free property, produces a figure of £1,150. The limit of £1,000 was, accordingly, exceeded but that which was to be brought into account for aggregation was only the free and settled property, the £200 policy being non-aggregable.

Death after Finance Act, 1946

Section 46 of the Finance Act, 1946, and the Tenth Schedule to that Act provided a new section 16 (3) of the Finance Act, 1894. The object of the new section was to deal with a difficulty, from the Revenue point of view, which arose under the original section. This difficulty was as follows:—The original section referred to property in respect of which estate duty is payable. This meant that only property subject to estate duty could be taken into account in ascertaining the amount which was not to be exceeded if the small estate was to be exempted from aggregation. Thus, there passed on A's death:—

Free property	£950
Non-aggregable policy	£100
Settled property	£2,000

No duty was payable on the non-aggregable policy as not exceeding £100 (Finance Act, 1894). Accordingly, the only figure to be brought into account in computing whether the exemption figure of £1,000 was exceeded or not, was the value of the free property. As this did not exceed £1,000, aggregation was not effected as between the small estate and the settled property.

This position was remedied by a provision of the section 16 (3) enacted by the Finance Act, 1946, to the effect that the items to be brought into the computation of the £1,000 figure were all items upon which estate duty would be payable if estate duty was payable on estates of however small a value. In other words, an assumption was made that property was never exempted from estate duty by reason of its value. If the principle enacted by the Finance Act, 1946, is applied to the foregoing example, it will be seen that the non-aggregable policy must be brought into the calculation of the exemption figure. The policy was only exempted from estate duty by reason of its not being in excess of £100. It is deemed, upon the indicated assumption, not to be exempted from estate duty. The addition of £100 to the £950 small estate exceeds the exemption figure of £1,000 and aggregation is, accordingly, effected as between the free estate and the settled property.

Death after Finance Act, 1947

The Finance Act, 1946, extended exemption from duty to estates not exceeding £2,000. Section 50 of the Finance Act, 1947, increased the exemption from aggregation of small estates to the same figure. Accordingly, as respects deaths between the Finance

Acts, 1947 and 1954, the foregoing examples must be read with the increased exemption figure in mind.

It is convenient to note an aspect of exemption from aggregation of small estates with reference to the increased exemption figure, when the total value of the small estate and settled property does not exceed £2,000, although the total property passing exceeds this figure. For example, on A's death there passed:—

Free property (small estate)	£1,000
Non-aggregable policy	£1,100
Settled policy	£900

Here, although the total value of the free property and non-aggregable policy exceeds £2,000, the total value of the free and settled property does not exceed this figure. Under the Finance Act, 1946, estates not exceeding £2,000 were exempted from duty. The total of the free and settled property did not exceed this figure, so that duty was not payable.

Death after Finance Act, 1954

Extensive changes in the law concerning the aggregation of small estates were made by section 33 (1) of the Finance Act, 1954. The subsection provided:—

"For subsection (3) of section sixteen of the Finance Act, 1894, there shall be substituted the following subsection:—

'(3) Where the property passing on the deceased's death includes any such settled property as is hereinafter mentioned, then—

(a) if the other property passing on the death, exclusive of that settled property and exclusive also of any property in respect of which estate duty neither is payable on the death nor would be if the duty were payable on estates of however small a principal value, is of a net value not exceeding ten thousand pounds, it shall not be aggregated with that settled property, but shall be an estate by itself; and

(b) if that other property is of a net value exceeding ten thousand pounds, the duty payable in respect of it shall not exceed the amount of the excess together with the duty which would have been so payable if the net value of the other property had been reduced rateably by the amount of the excess (but this shall not affect any reduction falling to be made under section thirteen of the Finance Act, 1914, in the duty payable on that settled property).

'The settled property above referred to is any settled property other than property comprised in a settlement made by the deceased or made, directly or indirectly, at his expense or out of funds provided by him, and other than property not so comprised of which he has been competent to dispose and has disposed by the exercise by his will or otherwise of a power conferred by the settlement, or which devolves on his personal representatives as assets for payment of his debts'."

The effects of the foregoing subsection may be set out as follows:—

(1) Exemption from aggregation of small estates was increased from to £2,000 to £10,000.

(2) For the purposes of the section, the property passing on the death is divided into: (a) other property (small estate and non-aggregable property), (b) settled property as defined by the section.

(3) A form of marginal relief was introduced when the other property exceeded £10,000.

(4) The marginal relief introduced by the section is not to affect the marginal relief introduced by section 13 of the Finance Act, 1914.

(5) A number of items of property which were formerly treated as settled or not settled, or which the taxpayer could elect to treat as settled or not settled, were transferred into the other property group.

The increased exemption rate

When there is no margin, *i.e.*, where the other property does not exceed £10,000, there is, as has been indicated, no aggregation with the settled property passing. Thus, on A's death there passed:—

Other property,	
free estate	£8,000
Settled property	£20,000

No aggregation. Free property taxable at 4 per cent. Settled property taxable at 12 per cent.

The foregoing position remains when further non-aggregable policy passes, provided the £10,000 limit is not exceeded. For example:—

Other property,	
free estate	£9,000
non-aggregable policy	£500
Settled property	£20,000

No aggregation. Free estate taxable at 4 per cent. Non-aggregable policy, exempted. Settled property taxable at 12 per cent.

Single margin relief

When there is a margin, *i.e.*, when the other property exceeds £10,000, paragraph (b) of the final section 16 (3) applies. For example, on A's death there passed:—

Other property,	
free estate	£10,500
Settled property	£22,000
	£32,500

Apart from the new margin provisions, duty would be payable at 21 per cent., the aggregated rate on an estate of £32,500, on the free estate and the settled property. The duty on the free property, upon this basis, would amount to £2,205. This is limited by the new margin provisions as follows:—

Duty on £10,000 at 4 per cent.	£400
plus excess of £10,500 over £10,000	£500
	£900

The duty on the settled property remains at 21 per cent.

In some cases, the duty payable as a result of full aggregation would be less than what would be payable if the margin provisions were applied. The question of whether the margin provisions give relief or not depends upon the excess of the other property over £10,000. When the margin provisions are unfavourable they are to be disregarded. For example:—

Other property,	
free estate	£13,000
Settled property	£22,000
	£35,000

The rate on an aggregated estate of £35,000 is 21 per cent. and, as applied to the free property, gives a resultant duty of £2,730. This is less than the amount payable under the margin provisions, *i.e.*:

Duty on £10,000 at 4 per cent.	£400
Plus excess of £13,000 over £10,000	£3,000
	£3,400

On the other hand, if the free property in the above example amounted to £12,000, and the settled property to £23,000, the margin provisions would be favourable. Thus:—

Other property, free property	£12,000
Settled property	£23,000
	£35,000

Aggregated rate is 21 per cent. Apart from margin provisions duty on the free property would be £2,520. Under the margin provisions this duty is restricted as follows:—

Duty on £10,000 at 4 per cent.	£400
Plus excess of £12,000 over £10,000	£2,000
	£2,400

It has been stated that the question of whether the margin provisions give relief or not depends upon the extent of the excess of the value of the "other property" over £10,000. This is, of course, relative to the aggregated rate which is applicable in each case. There is, therefore, with respect to each rate of duty, a certain excess figure at which the margin provisions give no relief and over which they would be a disadvantage. As an instance, with reference to the 21 per cent. rate, the margin provisions give no advantage, where the excess is £2,151 18s. For example:—

Under the margin provisions the duty on the other property would be:—

4 per cent. of £10,000	=	£400
Plus excess of £12,151 18s. over £10,000		£2,151 18 0
		£2,551 18 0

Upon full aggregation 21 per cent. of £12,151 18s. = £2,551 18s.

Margin and non-aggregable property

It will be noted that paragraph (b) of section 16 (3) of the Finance Act, 1894, enacted by section 33 (1) of the Finance Act, 1954, provides that, where the other property exceeds £10,000, the duty payable in respect of it is not to exceed the amount of the excess, together with the amount of the duty which would be

payable if the other property had been reduced rateably by the amount of the excess over £10,000.

It will be further noted that, in the above examples, duty was computed on the sum of £10,000, no rateable reduction being made. This principle seems to be correct on the ground that it is not possible to reduce rateably a single item. Upon this basis, there must be at least two estates, in addition to the settled property, for the word "rateable" to have any effect. For example there passed on A's death:—

Other property,	
free estate	£8,000
non-aggregable policy	£4,000
Settled property	£50,000

The non-aggregable policy increases the notional small estate to £12,000, but the aggregable fund would be £58,000, the policy itself being non-aggregable. On this basis the duty on the "other property" would be as follows:—

Free estate (rate appropriate to estate of £58,000, 35 per cent.)	£2,800
Non-aggregable policy (rate appropriate to estate of £4,000, 1 per cent.)	£40
	£2,840

Under the marginal and rateable reduction provisions the duty of £2,840 would be reduced as follows:—

£8,000 free property becomes	£6,666	13	4
£4,000 policy becomes	£3,333	6	8
Duty on £6,666 13s. 4d. at 3 per cent.	£200	0	0
Duty on £3,333 6s. 8d. at 1 per cent.	£33	6	8
Plus excess of £12,000 over £10,000	£2,000	0	0
	£2,233	6	8

Double margin relief

The margin under section 13 of the Finance Act, 1914, may have to be considered at the same time as the margin under the new section 16 (3) of the Finance Act, 1894. It will be noted that paragraph (*b*) of the latter section provides that the section is not to affect any relief which may be available under section 13 of the Finance Act, 1914. The result is that if the aggregable fund falls within a section 13 margin and the "other property" portion

of that fund falls within a section 16 (3) margin, the duty on the non-section 16 (3) property is calculated by reference to the amount of the notional duty, as limited by the section 13 margin. For example:—

Other property, free estate	£12,000
Settled property	£29,000
	£41,000

Duty on £41,000 is at the 24 per cent. rate, appropriate to an estate of £40,000, plus the excess in accordance with the provisions of section 13 of the Finance Act, 1914. Thus:—

Duty on £40,000 at 24 per cent.	£9,600
Plus excess	£1,000
	£10,600

Duty on the " other property " apart from section 16 (3) margin =

$$\frac{12}{41} \times £10,600 = £3,102\ 9s.$$

Limited by section 16 (3) margin to:—

4 per cent. of £10,000	£400
Plus excess of £12,000 over £10,000	£2,000
	£2,400

The duty on the settled property is then computed by reference to its proportion of the notional duty charged on the whole aggregable estate, upon the assumption that no relief was available under the section 16 (3) margin, *i.e.*,

$$\frac{29}{41} \times £10,600 = £7,497\ 11s.$$

Settled and non-settled property

It will be observed that the new section 16 (3) defines " settled property " for the purposes of the section. Settled property has therefore a restricted meaning and is to be regarded only as any settled property other than:—

(i) Property comprised in a settlement made directly or indirectly by the deceased, or

(ii) Property of which the deceased was competent to dispose, and of which he did dispose, by virtue of a power comprised in the settlement.

(iii) Property which devolves on the personal representatives of the deceased as assets for the payment of his debts.

The items taken out of the definition of settled property accordingly are chiefly estates in expectancy, if comprised in settlements made by the deceased or devolving on his personal representatives as assets for payment of his debts, and joint property provided by the deceased. These items, in particular, become "other property."

THE LANDLORD'S CLAIM FOR DAMAGES FOR BREACH OF THE CONTRACT TO REPAIR

By W. A. West, LL.B., Barrister-at-Law

Before March 25, 1928 (when the Landlord and Tenant Act, 1927, came into force), the amount of damages recoverable by a landlord for a tenant's breach of repairing covenant or agreement differed according to whether the action was brought during the currency of the lease or after the lease had come to an end.

The action taken during the currency of the lease would be for damages for breach of covenant or agreement to *keep* the premises in repair and the measure of damages is and always has been the amount by which the value of the reversion has been depreciated. In order to arrive at the value of the depreciation of the reversion it is necessary to determine "the difference in value between the value of the reversion with the covenant performed as it ought to be, and the value of the reversion with the covenant unperformed which it ought not to be" (*a*). Obviously this amount will vary according to the length of time the lease has still to run. For instance, in the case of a lease for 99 years with 96 years still to run, the marketable value of the reversion will probably be unaffected by the tenant's neglect to repair; whereas if 96 years of the lease had expired and the lease had only three years to run, the neglect of the tenant to repair might cause serious injury to the marketable value of the reversion, and the amount of damages might be almost as much as the actual cost of carrying out the necessary repairs.

When a lease has come to an end an action for damages may be brought on either the covenant to keep in repair or the covenant to leave in repair. The covenant to leave in repair is distinct from the covenant to keep in repair, and an action for breach of it lies at the end of a lease notwithstanding that a previous action may have been brought for breach of covenant to keep in repair; but damages recovered in the previous action may affect the amount of damages recoverable (*b*).

Before March 25, 1928, the recoverable amount in an action for damages brought at the end of the term was the reasonable and

(*a*) *Per* Lindley L.J. in *Ebbetts* v. *Conquest* [1895] 2 Ch. 377, at p. 383; affirmed by House of Lords [1896] A.C. 490.
(*b*) *Ebbetts* v. *Conquest*, *supra*.

proper amount necessary to put the premises in the state of repair in which they ought to have been left in accordance with the repairing covenant. That standard has been fully discussed in a previous article but it may be mentioned that a deterioration in the character of the locality since the granting of the lease would not affect the standard of repair imposed by the covenant (*c*). Further, the landlord was entitled to compensation for the loss of the use of the premises while the repairs were being done, but this was not necessarily the full rent of the premises during the time (*d*). The rule was the same whatever might be the intention of the landlord as to the future use of the premises. If he had contracted with a third party to pull down or alter the premises it in no way affected the tenant's obligations (*e*); even if the landlord had pulled down the buildings after the termination of the lease it made no difference to the tenant's liability (*f*). The rule was inequitable in one sense, for it involved the payment of a large sum by the tenant for repairs which the landlord never intended to execute, but if the damages were to be proportionate to the actual loss sustained by the landlord it is obvious that a tenant who had broken his contract by failure to repair might, in particular circumstances, be in a better position than another tenant who had kept his contract by expending large sums of money in keeping the property in repair as he had agreed to keep it.

However that may be, the Landlord and Tenant Act, 1927, s. 18 (1) has altered the law, with a view to limiting the amount of damages recoverable by the landlord to the loss actually suffered by him. The subsection applies to leases whether executed before or after the commencement of the Act (*g*) and provides that "Damages for the breach of a covenant or agreement to keep or put premises in repair during the currency of a lease or to leave or put premises in repair at the termination of a lease, whether such agreement is expressed or implied and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid, and in particular no damages shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease if it be shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled

(*c*) See *Anstruther-Gough-Calthorpe* v. *McOscar* [1924] 1 K.B. 716.
(*d*) *Woods* v. *Pope* (1835) 6 C. & P. 782; *Birch* v. *Clifford* (1891) 8 T.L.R. 43.
(*e*) *Joyner* v. *Weeks* [1891] 2 Q.B. 31.
(*f*) *Inderwick* v. *Leach* (1884) 1 T.L.R. 95; 434.
(*g*) s. 18 (3).

down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

Section 18 (1) has been proliferous of litigation and it is proposed in this article to consider the most important cases and so far as possible to extract general principles laid down by the courts.

What is a covenant to repair?

Where the covenant is not one to repair within the meaning of the subsection, the amount of damages will clearly not be limited by the provisions of the subsection, although even here the measure of damages will not necessarily be the full cost of reinstatement.

In *Moss Empires, Limited* v. *Olympia, Limited* (*h*), it was held that the subsection has no application to a covenant either to spend a stated sum on repairs and decorations or to pay to the landlord the difference between the stated sum and the amount actually expended. The amount payable under such a covenant is not payable as "damages for breach of covenant to repair" within the meaning of the subsection. It is a sum recoverable as a debt.

In *Eyre* v. *Rea* (*i*), the defendant, by causing the conversion of the premises into five separate flats by arrangement with the five sublessees, was in breach of covenants in the lease not to alter the internal planning of the premises, not to permit the premises to be used otherwise than as a private dwelling-house in one occupation, and not to underlet or part with the possession of any part of the premises. The judge granted a forfeiture of the lease, refusing a claim for relief under section 146 (2) of the Law of Property Act, 1925, and held: (1) the limitation of damages imposed by section 18 of the Landlord and Tenant Act, 1927, for breach of covenant to repair, should not be extended to breaches of this nature; and (2) notwithstanding that the premises as converted were financially more valuable, the plaintiffs were entitled to the cost of restoring them back to a single dwelling-house plus the loss of rent during the period of reconversion.

This decision was explained in a later case, the *Duke of Westminster* v. *Swinton* (*k*). Premises were let by the plaintiff on a long lease to the defendants. There were covenants not to use the premises for any trade, business or profession, or otherwise than as a private dwelling-house, and not to make structural alterations without consent. There was also a proviso for forfeiture on breach.

(*h*) [1939] 3 All E.R. 460. See also *Plummer* v. *Ramsey* [1934] W.N. 42.
(*i*) [1947] 1 All E.R. 415.
(*k*) [1948] 1 All E.R. 248.

The defendant had sublet the premises and they had been sublet again by the sublessor. The sub-sublessee converted the premises into flats and the plaintiff sued the defendant for forfeiture and for damages. The sublessee and sub-sublessee were joined as defendants.

Giving judgment for the plaintiff, Denning J. said: "As to damages for breaches of these covenants, the decision of Atkinson J. in *Eyre* v. *Rea* must not be taken as a decision that in every breach of this kind the cost of reinstating the premises is the measure of damages. I am sure Atkinson J. did not mean that. In *Joyner* v. *Weeks* (*l*) the Court of Appeal held that, on a breach of covenant to deliver up in repair at the end of the lease, the cost of repairs was the measure of damages in all cases, even though the money was not going to be used on repair and the premises were going to be pulled down next day. That, however, was never applied to cases of covenants to keep in repair during the term: see *Conquest* v. *Ebbetts* (*m*). The measure of damages for breach of covenant to keep in repair during the term is such sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant. It was to remedy *Joyner* v. *Weeks* that section 18 of the Landlord and Tenant Act, 1927, was passed. In cases which are not breaches of covenants to deliver up in repair the law has always been, and still is, that there is no rigid rule that the measure of damages is the cost of reinstating the premises. It depends on the particular case. In *Eyre* v. *Rea* no doubt the cost was the proper measure because the right course was to reinstate the house at once, and that is what the landlords intended to do. The real question in each case is: What damage has the plaintiff really suffered from the breach? I think I ought not to take the full amount of the cost of reinstatement . . ."

The court granted relief from forfeiture to the head lessee and sub-lessee on condition that the premises were reinstated in two years' time or such longer period as the court might allow. The sub-sublease was forfeited, however, and the measure of damages to be paid by the sub-sublessee to the sublessee was the damage sustained by the latter represented by the cost of reinstatement which the sublessee would have to undertake in due course, less an allowance for the benefit of rents from the converted flats meanwhile, plus the sublessee's own costs of the action and those of the head lessor and head lessee for which the sublessee was liable.

Judicial explanation as to the extent to which the rule in *Joyner* v. *Weeks* continues to apply to damages for breach of

(*l*) [1891] 2 Q.B. 31.
(*m*) [1896] A.C. 490.

covenants for reinstatement was given by the decision in *James* v. *Hutton* (*n*), where the tenant on being given licence by the landlord to construct a new shop front, covenanted to reinstate the premises in their original condition at the expiration or sooner determination of the lease. Owing to requisitioning, the lease was terminated by agreement and the landlord now sued for breach of the covenant to restore the premises to their former condition. The court held that the same rules apply to a breach of covenant to restore as to any other breach of contract and, therefore, as no damage was shown by the plaintiff, only nominal damages (of 20s.) were awarded.

Lord Goddard C.J. in giving judgment, said: ". . . In our opinion, the general rule as to damages for breach of contract ought to be applied, namely, to ascertain what the damage actually suffered amounts to. A covenant is only a special form of contract and the same rules apply to a breach of covenant as apply to a breach of a simple contract so far as damages are concerned.

"To apply to this case the rule as to the measure of damages for a breach of contract to deliver up a house in repair is, in our opinion, wrong, for there is no true analogy between the two cases. If a tenant fails to deliver up a house in repair, the landlord must suffer some damage at least so long as the house remains in existence. Instead of getting a house in a perfect state of repair he gets one which is dilapidated. . . . that case must be regarded as proceeding on the footing that the landlord must have suffered damage by the tenant yielding up the house out of repair. We see no ground here for assuming that the landlord in the present case has suffered any damage at all."

These decisions seem to show that if the landlord does not intend to carry out the reinstatement or other work in any case, then he has suffered no damage and can, therefore, recover merely nominal damages for a technical breach of covenant.

In *Cunliffe* v. *Goodman* (*o*) there was a covenant "to keep the . . . premises in good and sufficient repair during the . . . term and in particular reinstate the premises at the end of the term . . . as a private dwelling-house. . . ." Lord Goddard C.J. held that the reinstatement referred to in the covenant was regarded by both parties as a matter of repair and it would mean giving an unduly narrow construction to the Act, if the work were not caught by the words of section 18 (1).

(*n*) [1949] 2 All E.R. 243 (C.A.).
(*o*) [1949] 2 All E.R. (judgment in this case was reversed in the Court of Appeal, but on another point).

From a comparison of *James* v. *Hutton* and *Cunliffe* v. *Goodman*, it would appear that a reinstatement covenant may or may not be a repairing covenant within the meaning of the Landlord and Tenant Act, 1927, s. 18 (1), depending on the circumstances of the case and the intention of the parties.

Reversion expedited by forfeiture or delayed by requisitioning

In *Hanson* v. *Newman* (*p*), the tenant's lease had been forfeited for non-repair and the court had to consider how the damages should be assessed in a case where the tenant had gone out of possession, leaving the premises out of repair. The tenant attempted to have the damages recoverable diminished because by the forfeiture the landlord had regained possession six years before he normally would have done. It was held, however, that such reduction could not be allowed and the proper method of assessment of damages is to take the value of the reversion as it is with the breach and take it as it would be if there were no breach, the date of re-entry being the operative date in each case (but any benefit accruing to the landlord by reason of his obtaining possession prematurely because of the forfeiture must be ignored). The difference between the two values is the limit of the damages which can be recovered.

In *Smiley* v. *Townshend* (*q*), the premises were under requisition when the lease expired, and the court held:—

(1) the diminution in the value of the reversion within the meaning of section 18 (1) must be assessed by reference to its value, not at the time when the land reverted in possession, but when the lease expired;

(2) accordingly, it was not permissible to speculate as to the possibility of the requisitioning authority doing repairs which it was under no legal liability to do, so lessening the damages to the landlord, but the premises had to be valued as at the date when the lease expired, having regard to the fact that they were under requisition, and the difference found between the value of the requisitioned premises at that date if the repairing covenant had not been broken and their reduced value owing to the breach. This was the amount of the damage to the reversion.

From this case it is clear that the words "reversion (whether immediate or not)" in the subsection, mean the landlord's interest in the property at the end of the lease, although that interest may be subject to a reversionary lease granted by the landlord

(*p*) [1934] Ch. 298.
(*q*) [1950] 1 All E.R. 530 (C.A.).

or to requisition (*r*). The case also makes clear that the court cannot take into consideration the possibility that a requisitioning authority will carry out extra repairs gratuitously. (Under the provisions of the Landlord and Tenant (Requisitioned Land) Act, 1944, dilapidations occurring during the actual period of requisition are not the tenant's liability. These must be made good by the requisitioning authority, and such repairs, which the authority are bound to do, are taken into account when assessing the damage to the reversion. The tenant, however, remains liable for his own breaches of covenant.)

Diminution in value of reversion

Two further problems in connection with the interpretation of the subsection have come before the courts. First, post-war shortage of accommodation resulted in a state of affairs in which want of repair has not materially affected the letting or saleable value of the reversion, and, secondly, where part only of a house is concerned it is clearly difficult to assess the saleable value of that part in order to compute the diminution to that value. The first of these problems arose in *Landeau* v. *Marchbank* (*s*). In this case it was held that lack of repair was not in itself prima facie evidence of damage to the reversion, and, before the lessor could recover any sum, the court must be satisfied, not only that there had been a breach of the covenant to repair but also that, as a result of that breach, there had been a diminution in the value of the reversion. As in this case the plaintiff was unable to prove such diminution (having sold the premises for conversion into flats at the determination of the lease for an admittedly good price), she was awarded nominal damages only.

Lynskey J. said in this case: "It seems to me that the fact that repairs are necessary is not in itself even prima facie evidence of damage to the value of the reversion. In certain circumstances it may be an important factor, but, of itself, the fact that a certain amount of repair needs to be done does not, in my view, necessarily mean that there is damage to the reversion. It depends on the circumstances." This dictum has, however, been modified by subsequent cases.

The same question came before the courts in *Jones* v. *Herxheimer* (*t*), and in this case the problem of assessing the value

(*r*) See also *Terroni* v. *Necchi and Corsini* ([1931] 1 Ch. 515), in which Maugham J. held that "reversion" in the section means the reversion immediately expectant on the lease, irrespective of that expectant on any reversionary lease.

(*s*) [1949] 2 All E.R. 172.

(*t*) [1950] 1 All E.R. 323 (C.A.).

of the reversion to part only of a house also arose. A tenant of part of a house, who was in breach of his repairing covenant, relied on the fact that the landlord had produced no evidence of damage to the reversion, and he further pleaded that the want of repair did not affect the letting value. The court, however, held that as the repairs which the landlord had to carry out to put them in a fit state for reletting were repairs within the covenant and were no more than were reasonably necessary to make the five rooms fit, according to ordinary standards, for occupation for residential purposes, there was evidence that the proper cost of repairs represented a diminution in the value of the reversion due to the tenant's breach of covenant and therefore the cost of repairs was recoverable by the landlord under the Landlord and Tenant Act, 1927, s. 18 (1). The court said that there must be many cases in which it is, in fact, quite obvious that the value of the reversion has, by reason of a tenant's failure to do some necessary repair, been damaged precisely to the extent of the proper cost of effecting the repair in question.

Jenkins L.J. said, after reviewing the authorities: ". . . There must be many cases in which it is, in fact, quite obvious that the value of the reversion has, by reason of a tenant's failure to do some necessary repair, been damaged precisely to the extent of the proper cost of effecting the repair in question. Nor do we understand the learned lords justices in *Hanson* v. *Newman* (*u*), as purporting to lay down an invariable rule of law to the effect that in all cases and in all circumstances the procedure of placing values on the reversion repaired and the reversion unrepaired, and ascertaining the difference, must necessarily be gone through in order to ascertain the diminution in the value of the reversion attributable to the want of repair. Nor do we regard MacKinnon L.J. in *Salisbury* v. *Gilmore* (*a*) as intending to do anything more than to hold that, on the evidence tendered by the plaintiffs in that particular case, the cost of effecting the repairs could not be regarded as any index of the diminution (if any) in the value of the reversion which the want of repair had occasioned.

"In the present case the 'reversion' for the purposes of section 18 (1) consists simply of the four first floor rooms and one ground floor room formerly comprised in the tenancy, *i.e.*, not a whole house but merely a set of rooms in a house: see *Hanson* v. *Newman* (*u*). The matter is thus uncomplicated by any question of site value, such as materially affected the evidence

(*u*) [1934] Ch. 298; 103 L.J.Ch. 124; 150 L.T. 345.
(*a*) [1942] 2 K.B. 38; [1942] 1 All E.R. 457.

regarding the New Bond Street premises in *Salisbury* v. *Gilmore* (*a*). Nor is there here any question of change of user (as in *Portman* v. *Latta* (*b*)), or of sale and physical alteration (as in *Landeau* v. *Marchbank* (*c*)). In the present case the landlord, having resumed possession of five rooms in his house which had been let for residential purposes, and intending to use or relet them for residential purposes, found that through the tenant's breach of covenant it was necessary for him to do certain repairs to the rooms, in order to put them in what he considered a fit state for occupation or reletting for residential purposes, and, accordingly, he spent money on effecting those repairs, which he would not have had to spend if the covenant had been duly performed. In such a case, if there is evidence that the repairs done, being repairs within the covenant, were no more than were reasonably necessary to make the rooms fit for occupation or reletting for residential purposes, we fail to see why the proper cost of those repairs should not be regarded, prima facie, as representing a diminution in the value of the reversion due to the tenant's breach of covenant, being money which the landlord, acting as an ordinary prudent owner, had to spend on the property owing to the breach, and would not have had to spend but for the breach.

". . . There could be no question as a practical matter of a sale of the five rooms let to the tenant (which, as we have said above, constitute the reversion) separately from the rest of the house. Mr. Batty's intention [Mr. Batty was surveyor for the tenant] presumably was to show that there was no diminution in the value of the reversion according to the calculation prescribed in *Hanson* v. *Newman* (*u*). That calculation is, no doubt, the right criterion to apply in many, if not most, cases, and we do not for a moment intend to cast any doubt on its validity as a measure of the damages recoverable under section 18 (1) in cases to which it is appropriate. But we certainly deprecate its introduction as a *sine qua non* into all cases, including a small and simple case like the present, concerned with a letting of some of the rooms in a house, where it becomes a purely hypothetical calculation wholly removed from the practical realities of the matter. Nor do we think that the learned county court judge was necessarily bound to accept Mr. Batty's assertion in re-examination to the effect that the want of repair did not affect the letting value of the premises, if he was satisfied on the evidence

(*b*) [1942] W.N. 97.
(*c*) [1949] 2 All E.R. 172.

as a whole, as we think he clearly was, that the repairs of which he assessed the proper cost at £36 were reasonably necessary to make the five rooms fit, according to ordinary standards, for occupation or reletting for residential purposes. . . ."

Again, in *Maddox Properties, Ltd.* v. *Davis* (*d*), the Court of Appeal took the cost of repairs necessary to remedy a tenant's breach of covenant to repair as evidence of damage to the reversion and awarded the cost of those repairs to the landlord.

In *Smiley* v. *Townshend* (*e*), Singleton L.J. said that he agreed with the dictum of Lynskey J. above, except that in place of the words "even prima facie" there ought to be placed the word "conclusive." Denning L.J. said in the same case (at page 534): ". . . In cases where it is plain that the repairs are not going to be done by the landlord, the cost of them is little or no guide to the diminution in value of the reversion, which may be nominal: see *Espir* v. *Basil Street Hotel, Ltd.* (*f*) and *James* v. *Hutton* (*g*). In cases where the repairs have been, or are going to be, done by the landlord, the cost may be a very real guide. That is shown by the recent case of *Jones* v. *Herxheimer* (*h*). In cases where it is open to question whether the repairs will be done by the landlord, as in the present case, the cost may afford a starting figure, but it should be scaled down according to the circumstances, remembering that the real question is: 'What is the injury to the reversion?' . . ."

In such cases as these, although the landlord may be able to let the premises unrepaired for the same rent as if repaired, he might not wish to do so, either because it would not be in accordance with good estate management to do so or because he wishes to occupy the premises himself, in which case he would probably consider that certain repairs are necessary. In such circumstances it would seem fair to assess the diminution in value of the reversion by calculating the sum which the landlord, as a matter of prudent estate management, would have to spend on repairs to make the place fit for occupation according to normal standards.

In *London County Freehold and Leasehold Properties* v. *Wallis-Whiddett* (*i*), the tenant was in breach of his repairing covenant at the end of the lease, and at that time the local authority had resolved to make a compulsory purchase order of the property,

(*d*) *The Estates Gazette*, February 25, 1950, p. 155.
(*e*) [1950] 1 All E.R. 530 (C.A.).
(*f*) [1936] 3 All E.R. 91.
(*g*) [1949] 2 All E.R. 243.
(*h*) [1950] 1 All E.R. 323.
(*i*) [1950] W.N. 180.

although the order itself was not made until after the termination of the lease. The landlord attempted to claim damages for breach of covenant on the grounds that ordinarily the property would have been in the market at the end of the lease, but the court held that the claim could not be entertained because any intending purchaser would have had to be informed of the contemplated compulsory purchase order, and consequently the property was not really in the market. The landlord could not recover any damages as the reversion had not been depreciated.

No damages recoverable when proposed alterations or demolition would render repair valueless

In *Salisbury* v. *Gilmore* (*k*), a landlord sued his tenant for damages for failure to deliver up the demised premises in repair according to the covenants of his lease. From 1937 the landlord had intended to pull down the premises as soon as the lease ran out, but after the lease ended on September 29, 1939, he abandoned his intention for the time being owing to the outbreak of war. On December 5, 1939, a letter was sent to the tenant which contained the first notification of the landlord's change of mind. The tenant contended that the case was within section 18 (1) and that, as he was not informed of the landlord's abandonment of the project before the end of the lease, he was not liable under his covenant. It was held by the Court of Appeal, reversing the decision of the court below, that the crucial date is the date of the determination of the lease, as after that date the tenant is no longer able to perform his covenant and, if there is an intention to pull down before that date and that intention still subsists at that date, the requirements of the subsection are satisfied; therefore the tenant was entitled to the relief given by the subsection. The court, in this case, referred to the wording of the subsection and said there is no need to transpose or add any words in order to construe its meaning: the explanation of the apparent difficulty in the wording is that two points of time have to be considered; the fate of the building has to be considered at the termination of the lease, but the tenant has to prove the intended fate of the building at the hearing of the action. Since it was agreed in this case that the premises at the termination of the lease had only a site value, there could be no diminution of the value of the reversion, and for this reason the action failed. Lord Greene M.R. said:

"It must now be considered whether . . . the second branch of

(*k*) [1942] 1 All E.R. 457.

section 18 (1) of the Landlord and Tenant Act, 1927, frees the defendant from liability to pay damages for breach of the covenant to deliver up in repair. That branch is worded in a way which at first sight appears crabbed and ungrammatical. Hilbery J. took the view that no coherent meaning could be given to it without transposing certain of the words. . . . The words which Hilbery J. found incapable of construction as they stand are the words:

> . . . if it is shown that the premises . . . would at or shortly after the termination of the tenancy have been or be pulled down . . .

It may be asked why the words 'would have been or be' were used rather than the words referring to the intention of the lessor. The answer is that a building might be destined for demolition for some reason other than the intention of the lessor, *e.g.*, under a demolition order or a compulsory purchase under a street widening scheme. It was therefore necessary to use words of general import expressing the future fate of the building whatever the cause of that fate might be. The draftsman might have used the expression 'were going to be pulled down at or shortly after the termination of the tenancy,' but he preferred to express futurity in a different but grammatically legitimate way.

"Two more points must be borne in mind in considering the structure of the sentence. The first is that the point of time in relation to which the fate of the building is to be considered is that at which the covenant to deliver up falls to be performed, namely, the termination of the lease. The other is that the date at which the tenant is to prove the intended fate of the building is the date at which the action claiming damages for breach of the covenant is heard, which is necessarily subsequent to the termination of the lease.

"These considerations appear to me to explain the construction of the sentence. The words 'would have been' are, I think, grammatically correct to express in a statement in *oratio obliqua* ('if it is shown that') made at a subsequent date (the date of trial) in relation to what, at an earlier date (the termination of the lease), was a future event which at that date was in contemplation . . .

"The question then arises, what is the test by which the fate of the building as at the relevant date—namely, the date at which the covenant ought to be performed—is to be ascertained? I have already pointed out that a building may be destined for demolition either because the landlord has so determined or because some extraneous authority has decided to exercise its powers in that behalf. I have also pointed out that the crucial date is the

date of the termination of the lease. Once that date has passed, the tenant is no longer in a position to fulfil his covenant, and, if it is shown that before that date arrives, the landlord has decided to pull down the building and that this intention is still existing at that date, the requirements of the subsection are, in my opinion, satisfied. . . ."

It is clear from *Cunliffe* v. *Goodman* (*l*), however, that the tenant must show that at the termination of the lease the landlord has made a *definite* decision or had a *definite* intention (whether or not it was *revocable* or in fact altered) to pull down the premises. To show a *conditional* decision or intention is not enough. In that case the landlord sought to recover damages for alleged breaches of repairing and reinstatement covenants in respect of premises let to a manufacturing chemist. Breaches of the covenant were admitted, but the tenant contended that he was relieved from liability under the provisions of section 18 (1). On the termination of the tenancy, the landlord was considering demolishing the premises and erecting on the site blocks of flats, but she had not then definitely decided whether to do so or not, as the carrying out of such a scheme was conditional of her obtaining permission of the local planning authority and building licences, and even then the scheme might not prove financially attractive. It was held that such conditional intention was not sufficient to bring the case within the subsection. The tenant must prove that, at the date of the termination of the lease, there was a firm intention to demolish the premises.

Structural alteration affecting part only of premises

It was held in *Gort Estates* v. *Fridman* (*m*) that if part only of the repairs would be rendered valueless by structural alterations, damages could be recovered in respect of the part of the premises which were not affected by such alterations.

Effect of incoming tenant's covenanting to repair

In *Haviland* v. *Long* (*n*) an outgoing tenant was in breach of his repairing obligations. The incoming tenant covenanted with the landlord to do the repairs and the landlord undertook to take all necessary steps to recover the cost from the outgoing tenant and to pay whatever he was able to recover over to the incoming tenant. The court held that the fact that a new tenant has undertaken to repair does not diminish the outgoing tenant's liability.

(*l*) [1950] 1 All E.R. 720.
(*m*) (1938). Reported in *The Estates Gazette*, December 17, 1938.
(*n*) [1952] 2 Q.B. 80; [1952] 1 All E.R. 463.

Somervell L.J. said:—

". . . I cannot see why that right [to recover damages] should be lost because it is made a term in a bargain. It is obvious that, if the landlords had not had this right—suppose, for example the landlords had abandoned their right to enforce the repairing covenant—the terms of the new lease would have been different. The new tenants would never have agreed to pay the economic rent for a repaired building and do the repairs themselves unless they had been satisfied that, quoad those repairs which were covered by the old lease, they would get, through the landlords, a sum, however it was quantified, representing the old tenants' liability. I cannot understand how it could be said that because a man has bargained with a right he loses it. The position is summarised in a paragraph in the learned judge's judgment, in which he says:

> 'In my judgment, it is the fact that (the repairs) require to be done and not the circumstances in which the landlord and his new tenant agree on the manner of meeting the charge which is the governing consideration.'

That sentence, I think, is the answer to the appeal here, which, for the reasons given by the learned judge—with all of which I agree—must be dismissed."

In the same case, Denning L.J. said: "I agree with all that my Lord has said. The measure of damage is the amount by which the market value of the reversion at the end of the lease was diminished by the want of repair. That depends on whether the repairs are going to be done or not. In cases where they have been or are going to be done the cost of repair is usually the measure of damage. The fact that the landlord has an undertaking from a new tenant to do the repairs does not go in diminution of damages. It is *res inter alios acta*. . . ." (*nn*).

Roxburgh J. said: ". . . The argument [for the tenants] is in defiance of the passage from the judgment of Lawrence L.J. in *Hanson* v. *Newman* (*o*), cited by the learned judge, where the learned lord justice said:

> 'A reversion may not be a reversion in possession (*i.e.*, it may not be immediate) by reason of the freeholder having granted a reversionary lease, and in that case the reversionary lease is to be disregarded in assessing the damages [under s. 18 (1)].'

(*nn*) But this was just the benefit the legislature intended to give the tenant. S. 18 (1) was passed to remedy *Joyner* v. *Weeks* (*supra*), *i.e.*, to give the tenant the benefit of *res inter alios acta*.

(*o*) [1934] Ch. 298.

But in this case the argument can only stand up on the footing that the court does look at the reversionary lease and consider the arrangements which have been made in it with regard to the benefit of the covenant, and that is just what *Hanson* v. *Newman* (*o*) shows must not be done."

Standard of repair

In *Anstruther-Gough-Calthorpe* v. *McOscar* (*p*) (distinguishing *Proudfoot* v. *Hart* (*q*)), it had been held that the standard of repair required by a covenant will not diminish with a deterioration in the character of the neighbourhood. The decision in this case has, of course, lost much of its importance by reason of the operation of section 18 (1) and it is submitted that the standard suggested by Esher M.R. in *Proudfoot* v. *Hart* (such repair as, having regard to the age, character and locality of the house would make it reasonably fit for the occupation of a reasonably minded tenant of the class likely to take it) is the appropriate test to apply in assessing the tenant's liability.

For example, in *Portman* v. *Latta* (*r*) a high-class town house had been let on a twenty-one years' lease at £750 per annum. On the coming to an end of the lease, the lessor claimed £917 6s. 10d. as the cost of repairs plus a further sum for loss of rent. Evidence was given that the house was unlikely to be let again as a private residence and the tenant contended that in the circumstances the value of the reversion had not been diminished to the extent claimed. Croom-Johnson J., in giving judgment, said that it was common ground that in the letting of the premises, which formed part of the Portman Estate, there was a restrictive covenant for use as a private dwelling-house only. But fashion and times had changed. A large house such as this, with five reception rooms and eleven bedrooms, became less and less sought after. Many of the houses in Portman Square were underlet, some were pulled down, and some had been let for private institutions and Embassies. When the war broke out, it was manifest that premises of this class were not likely to appeal to persons desirous of using them as private residences. All the witnesses in this case agreed that the premises in question, so far as human intelligence could prophesy, were never likely to be used as single private residences again. Further, evidence for the defence was that the premises were old-fashioned and would need considerable sums of

(*p*) [1924] 1 K.B. 716 (C.A.).
(*q*) (1890) 25 Q.B.D. 42 (C.A.).
(*r*) (1942) 86 S.J. 119.

money spent on them for any purpose, whether a private residence or an institution. In his view the diminution in value of the reversion was not as much as the cost of repairs.

Damages as between lessee and underlessee

It is submitted that where the sublessee has notice that there is a superior landlord, the mesne landlord's liability over to the superior landlord must be taken into account, and the cost of putting the property into repair at the end of the lease may properly be considered for that purpose; although a nominal reversion is valueless even if the repairing covenants are complied with, nevertheless it becomes saddled with a liability in the event of breach of these covenants. That liability should presumably be treated as a diminution to the value of the reversion in so far as it converts a nil value into a minus value (*s*).

General conclusions

The effect of section 18 (1) is not to alter the *measure* of damages for breach of repairing covenant; it merely fixes a limit to the recoverable amount. So long as the diminution in value of the reversion is less than the cost of repair (as it almost always must be) the distinction is merely academic. It is possible, however, that a house may be included in a clearance or redevelopment area under Part III of the Housing Act, 1936, or in an area of comprehensive development under Part IV of the Town and Country Planning Act, 1947. If the house is scheduled as unfit for human habitation, it is acquired at site value only. Had it been in repair, it would have been acquired at its full market value (subject to the rules in the Acquisition of Land (Assessment of Compensation) Act, 1919; the Housing Act, 1936; and the Town and Country Planning Acts). It is submitted that the diminution in the value of the reversion may well be more than the cost of repair in such a case, but the landlord at best will be entitled only to his common law measure of damages (the cost of repair) (*t*). The Act does not entitle him to an amount equal to the diminution in value of the reversion; it merely provides that the recoverable damages shall not exceed that amount. And it may well be that the case will fall to be dealt with under the second branch of section 18 as it is likely to be demolished; the recoverable damages would then be

(*s*) See also *Colley* v. *Streeton* (1823) 2 B. & C. 273; *Ebbetts* v. *Conquest and Booth* [1895] 2 Ch. 377; *Espir* v. *Basil Street Hotel Co.* [1936] 3 All E.R. 91; *Scintilla* v. *Keable Press* (1948) 98 L.J. 178—a similar case in the county court.

(*t*) See *Joyner* v. *Weeks*, *supra*, in which Esher M.R. stated *obiter* that this measure of damages was an absolute rule.

nil. But can the legislature have intended that a tenant should so profit from his own wrong-doing? (*u*).

The recoverable damages under section 18 (1) should ordinarily be calculated by computing the difference between the saleable value of the reversion unrepaired and its value when the repairs have been done. The fact that repairs are necessary is not conclusive evidence of damage to the value of the reversion but, where it is intended that the repairs are to be done as a matter of prudent estate management, the recoverable damages will be the cost of repair even where (as in times of scarcity) the premises could be relet at the same rent even if unrepaired.

The operative date at which the value is to be calculated is the actual date of re-entry by the landlord where there is a forfeiture (but ignoring any benefit accruing to the landlord solely by reason of the acceleration of his reversion). Where, however, the reversion is delayed (by requisitioning or if there is a reversionary lease) the operative date on which the calculation is to be made is the date of determination of the lease.

In order to deprive the landlord of damages by reason of his proposed demolition or structural alteration of the premises, it must be shown that at the date of termination of the lease the landlord had definitely decided on the demolition or alteration (even if in fact he subsequently changes his mind).

Where part only of the repairs will be rendered valueless by demolition or structural alteration, damages are recoverable in respect of the part not affected.

A change in the character of the neighbourhood may affect the value of the reversion and consequently the amount of damages recoverable by the landlord.

The fact that the landlord has relet the premises to a new tenant who has covenanted to put them in repair will not affect the outgoing tenant's liability.

Where the covenant does not fall within the subsection, the measure of damages will be the actual loss suffered by the landlord from the breach. In reinstatement cases, this will not necessarily be the full cost of reinstatement. It will depend upon whether the landlord in fact intends to reinstate. A covenant to reinstate may, however, in certain circumstances be held to fall within the subsection.

It should finally be mentioned, that in the case of tenancies

(*u*) The provisions of s. 162 of the Housing Act, 1936 (as amended), should be noted in this connection. Under this section, an owner can apply to the court for an order entitling him to enter to carry out repairs. The lease may also be determined and an order made for payment of compensation.

qualifying for protection under Part I of the Landlord and Tenant Act, 1954 (in brief, any "long tenancy" at a rent of less than two-thirds of the rateable value provided that, if the tenant had been paying a rack-rent, he would be protected by the Rent Acts), a landlord will be able to claim damages for breach of repairing covenant at the end of the term only if the tenant does not become a statutory tenant under the Act. Otherwise, he must content himself with his entitlement to payment in respect of "accrued tenant's repairs."

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Reilly v. *Orange* [1955] 1 W.L.R. 616; [1955] 2 All E.R. 369 (C.A.)

Easement—prescription—user for over 19 *years—action brought —whether interruption only—Prescription Act,* 1832.—Under the Prescription Act, 1832, any period of user must be that next before an action in which the claim is questioned, and no interruption of user counts unless acquiesced in or submitted to for at least one year (s. 4). So user for 19 years and 330 days, followed by interruption for 35 days, was a good basis for a successful claim to an easement (*Flight* v. *Thomas* (1841) 8 C. & Fin. 231). In the present case, which concerned a right of way, user was again between 19 and 20 years but the plaintiff, owner of the servient tenement, sought *by action* a declaration that there was no easement, as well as an injunction and damages. The Court of Appeal (Singleton, Jenkins and Morris L.JJ.) held that he succeeded because the action, putting the easement into dispute, was not merely an interruption but marked the date down to which the requisite period of 20 years' user had to be shown (see the similar reasoning in *Hyman* v. *Van Den Bergh* [1908] 1 Ch. 167 at 175). A somewhat arbitrary distinction between physical interruption and challenge by writ must therefore be added to the several oddities of the Prescription Act.

The Court of Appeal was also in some doubt whether the user, which began under an apparently oral agreement, was prescriptive in nature at all but found it unnecessary to pursue this difficult point.

Attorney-General v. *Parsons & Others* [1955] 3 W.L.R. 29; [1955] 2 All E.R. 466 (C.A.)

Mortmain—short lease assigned to foreign company—forfeiture to Crown—whether Crown liable on covenants of lease—Mortmain and Charitable Uses Act, 1888.—This was another case arising out of the transfer to an Irish company, without any licence in mortmain or registration under the Companies Act, 1948, of the short unexpired residue of a lease. The Attorney-General asked, by way of originating summons, whether the land was vested in the Crown and, if so, whether the Crown was liable on the covenants of the lease. The Court of Appeal (Evershed M.R., Hodson and Romer L.JJ.) reviewing *Morelle, Ltd.* v. *Waterworth* [1955] 1 Q.B. 1 (Vol. 18 p. 420) and *Morelle, Ltd.* v. *Wakeling* [1955] 2 W.L.R. 672; [1955]

1 All E.R. 708 (*ante* pp. 190, 223), held (i) the land automatically vested in the Crown for the unexpired residue of the term, (ii) the Crown had no power to disclaim, (iii) the vesting was in no way conditional on any inquisition or entry by the Crown and, (iv) the Crown was entitled to the benefits and subject to the burdens of the leases, whether or not possession was taken. The decisions on the latter three points, all new, were held to follow by necessary implication from the reasoning in the two *Morelle* cases.

It is, with respect, satisfactory to find that the general principles of estate ownership are here applicable to the Crown, so that the leasehold interests do not go into a state of suspense—which would, said the Master of the Rolls ([1955] 3 W.L.R. at p. 39; [1955] 2 All E.R. at p. 473) " produce indeed a state of unreality."

A perhaps more important consequence is, however, that the Crown obtained leave to appeal to the House of Lords, so that a final pronouncement on the present law of mortmain is unlikely to be long delayed.

Chivers & Sons, Ltd. v. *Air Ministry (Queen's College, Cambridge, Third Party)* [1955] 3 W.L.R. 154; [1955] 2 All E.R. 607 (Ch.D.)

Ecclesiastical law—repair of chancel—liability of owner of rectorial land—contribution—covenants for title—Law of Property Act, 1925, s. 76.—By ecclesiastical law the rector was liable to repair the chancel of the church and had the rectorial property—land or tithes—to provide the means to do so. Now this burden is a several and personal liability imposed on the owner or owners for the time being of rectorial property, whether they be lay or ecclesiastical, and is not limited to the profits of the property. If there is more than one owner each is severally liable and entitled to contribution from the others. These principles were enunciated by the Court of Appeal in *Wickhambrook Parochial Church Council* v. *Croxford* [1935] 2 K.B. 417. Since the Chancel Repairs Act, 1932, judgment for a sum of money in the normal way has replaced the ecclesiastical remedy of admonition (see *Hauxton P. C. C.* v. *Stevens* [1929] P. 240).

In the present case parts of rectorial land, vested in Queen's College, Cambridge, as lay impropriator by an Enclosure Act of 1833 and award thereunder of 1834, had been conveyed to the plaintiffs and defendants respectively. The plaintiffs, having had to pay for repairs to the chancel at the instance of the Parochial Church Council, now obtained judgment for contribution from the defendants, the proportion being based on acreage by agreement. Wynn-Parry J. applied the principles set out above and rejected the argument that the liability to repair attached to the proceeds of sale in the hands of Queen's College (who now retained none of the land).

This liability had admittedly been overlooked on the sale to the defendants, who therefore sought indemnification from the College on the usual implied covenant for freedom from incumbrances. The learned judge held, however, that the College, who were in the position of purchasers for value, received the land subject to the

burden. Therefore the usual qualified covenant did not cover it (following *David* v. *Sabin* [1893] 1 Ch. 523 and authorities there cited). Moreover, he thought that in any event a personal liability of this sort, not being a charge on the land, was not within the covenant (considering the street works cases of *Stock* v. *Meakin* [1900] 1 Ch. 683 and *Egg* v. *Blayney* (1888) 21 Q.B.D. 107).

Re The Nottingham General Cemetery Company [1955] 3 W.L.R. 61; [1955] 2 All E.R. 504

Company—winding up—Disclaimer by liquidator—onerous covenants—jurisdiction of court—Companies Act, 1948, *s.* 323.—The Cemetery Company, established by special Act of Parliament in 1836, was thereby entitled to grant perpetual rights of burial in its land, as personal and assignable property. The Company was now in liquidation (owing to later statutory restrictions on burials) and had assets sufficient only for some two and a half years' maintenance of the cemetery. The liquidator consequently sought to disclaim under section 323 of the Companies Act, 1948. Wynn-Parry J. in a reserved judgment *held*:—

(1) The perpetual rights of burial, which would bind any purchaser with notice, amounted to an onerous covenant so as to bring the land within the section.

(2) *Re Woking U. D. C. (Basingstoke Canal) Act,* 1911 [1914] 1 Ch. 300, where a statutory canal company was held to have no power to sell the canal, was to be distinguished because here the undertaking had come to an end and, further, the liquidator's right to disclaim was special to him and not available to the company. Therefore no question of *ultra vires* arose and the court had jurisdiction.

(3) Discretion should be exercised in favour of the liquidator, so that dissolution could proceed in an orderly manner.

It is to be noted that the Crown admitted the vesting of the property on disclaimer (as to which see a note in (1954) 70 L.Q.R. at pp. 25–8) but denied any liability unless possession was taken, while the Nottingham Corporation would not have opposed disclaimer if the Crown would have admitted taking over the Company's liabilities. This dispute Wynn-Parry J. declined to decide.

Huyton-with-Roby U. D. C. v. *Hunter* [1955] 1 W.L.R. 603; [1955] 2 All E.R. 398 (C.A.)

Highway—cost of making up—whether repairable by inhabitants at large—burden of proof—jurisdiction of justices and Divisional Court—Private Street Works Act, 1892, *ss.* 5, 8.—The Private Street Works Act, 1892, enables local authorities to charge frontagers with the cost of making up any street "not being a highway repairable by the inhabitants at large" (see Highway Act, 1835, s. 23). The Court of Appeal held that these words imposed on the local authority

"a legal burden [of proof] which restricted them throughout the case from beginning to end. . . . If it [the court] can come to a determinate conclusion, no question of the legal burden arises; but if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the legal burden comes into play, and requires the court to say that the council have not proved the case" (*per* Denning L.J. [1955] 1 W.L.R. at pp. 608, 609; [1955] 2 All E.R. at p. 401). Consequently an appellate court has only to see if there is evidence on which the justices, who decide questions of fact, can reach a conclusion on the nature of the highway. In the present case the Divisional Court went wrong both in thinking that proof that no public money was ever spent on a road (which had existed since 1776) transferred the burden of proof to the frontager, and in assessing for itself the weight of the evidence before the justices.

It appears that in this case all parties co-operated to put in all the available evidence about the road in question but on principle it is satisfactory that the onus should be on the local authority, both as the party enforcing the charge and as the body most able, as a a rule, to produce the evidence and bear the cost thereof. It is also worth noting that Birkett L.J. rejected firmly the argument that the frontagers really came as appellants against an administrative act, saying that in fact they were exercising their statutory right to put the council to proof of its case ([1955] 1 W.L.R. at p. 613; [1955] 2 All E.R. at p. 403).

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2. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Baker v. *National Trust Co.* [1955] 3 W.L.R. 42; *sub nom.* *Re H. C. Cox (deceased)* [1955] 2 All E.R. 550 (P.C.)

Construction—general clause—rider limiting to small class—failure.—The authority of the Privy Council is so strong in practice that the instant decision might be regarded as somewhat unfortunate. This was an appeal from Canada. The settlor had created a trust to pay the income of a large fund for charitable purposes. A subsequent provision limited this to employees of a public corporation and their dependants. There were two approaches to the construction of this gift. The approach which was accepted by the Board articulated the objects into two stages. The initial provision was construed as a reference to the four types of charities recognised by law. In a second stage it was held that the limitation to employees must be engrafted on all four types. The result was that as a trust to educate employees is not charitable (*Oppenheim's Case* [1951] A.C. 297) the entire gift was not charitable, and failed. Why it was necessary to erect this "Aunt Sally" in order to demolish it is difficult to understand. The unsuccessful argument was that the gift created a trust for all objects

which were in fact charitable in law when confined to the employees. The intention of the settlor could be examined without reference to the classification of charities into classes. Under this construction it would be the duty of the trustees not to devote the income to any purpose which was not charitable, *e.g.*, not to the education of the beneficiaries. The Privy Council was impressed with the size of the fund, and considered it unlikely that the beneficiaries would require any sum of that kind to relieve their poverty or minister to similar elemental wants.

(Theobald 334.)

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Whitmore v. *Lambert* [1955] 1 W.L.R. 495; [1955] 2 All E.R. 147 (C.A.)

Will—probate—extrinsic evidence of existence of will—Rent Acts. —This case is really a decision on the law of landlord and tenant but does raise an interesting point on which there is little authority. A contractual tenant, A, died, leaving all his property to his widow W. Had he died intestate, as the law then stood, she would have become a statutory tenant under section 12 of the Rent Restriction Act. If he died testate, on the other hand, she succeeded to his tenancy. On her own subsequent death this became very material, since her adopted child had no claim to security of tenure under the first supposition, but himself had a claim under the now amended section 12 under the second.

In fact the original tenant, A, had executed a valid will, leaving all his property to W. She never proved this will, although the landlord had taken rent from her. If evidence of the existence of the will could be admitted, that was some evidence that W. took over the tenancy; if not, she must be treated as a statutory tenant on intestacy. The Court of Appeal held that extrinsic evidence was admissible. It was presumably not necessary to prove the original will, although this could still have been done. Technically the contractual tenancy remained vested in the President of the Probate Division, but the court held that this was no objection to leaving the child in possession. Evershed M.R. pointed out (p. 152): "I do not, for my part, consider it necessary or indeed desirable to attempt any exhaustive statement of the purposes for which evidence may be given of an unproved will. Nor do I think it necessary to express any concluded view on the question whether the words *die intestate* in the original section 12 (1) (g) of the Act of 1920 mean, and mean only, *die without a will which has been admitted to probate or its equivalent.*"

(Theobald 84, 120.)

Re Bone (decd.), Bone v. *Midland Bank* [1955] 1 W.L.R. 703; [1955] 2 All E.R. 555

Family provision—time to apply—provisional uncertainty of position—extension—Inheritance Act, 1938, *and Intestates' Estates Act,* 1952.—It may sometimes depend on the construction of a will whether or not provision has already been made for a dependant. While a decision is taken as to the issue of an originating summons for construction, therefore, the court may overlook delay in applying for a summons under the 1938 Act.

In this case counsel advised the issue of a construction summons but later another counsel advised it would be unnecessary. In the meantime, more than six months had elapsed since the grant of probate. The court extended the time.

There is specific provision for such extensions in section 2 (1A) (b) of the Act, which authorises extensions where there is a doubt as to the existence of interest or the nature of such interests. Obviously, it is necessary to know what the will means before one can say it has failed to make reasonable provision for the testator's dependants. Such provision would fit the description of " interest " in the section.

(Theobald 99.)

Re Arnould, Arnould v. *Lloyd* [1955] 1 W.L.R. 539; [1955] 2 All E.R. 316

Will—construction—implication of absolute interests—absence of indicia of intention.—This case involved a short point, though one with serious consequences. A testator left his " money " on trust for four named grandchildren until they attained the age of twenty-five. There was no indication as to what was then to happen, or what was to happen if they died under that age, married, childless, or otherwise. The court found it impossible to add anything to the terms of the provision. It was therefore construed as merely a provision of income up to that age. The capital would go on intestacy as there was no residuary gift in the will. The widow would therefore take the capital of the fund. This decision shows that a reference to " money " is still not equivalent to a residuary gift, although the word is given a wider meaning in home-made wills nowadays than in the past. Possibly the testator meant to leave his money to the four grandchildren, but that it should be " in trust " (in the sense of inaccessible to them) until they attained a reasonable age. " In trust " does have this popular meaning for many laymen. There was, however, no help for the situation caused by the testator's want of skill in draftsmanship.

(Theobald 625.)

Re Martin, Midland Bank Executor & Trustee Co. v. *Marfleet* [1955] 2 W.L.R. 1029; [1955] 1 All E.R. 865

Solvent estate—payment of debts and legacies—Administration of Estates Act, 1925, *s.* 34, *Sched. I, Pt. II.*—Danckwerts J. has here again given a very clear and useful decision, though many cases might be cited the other way. Residuary personalty was left on trust to pay debts. The realty was undisposed of and went as on intestacy.

The learned judge held (1) That debts fell primarily on the personalty because it was earmarked for that purpose, varying the statutory order. (2) Legacies fell on realty because they had, in the first instance, to come out of the property undisposed of.

There is an important distinction drawn between this case and *Re Thompson* [1936] Ch. 676. In the earlier case legacies fell on a mixed fund, consisting of real and personal property. Within this fund the legacies were held to be charged primarily on personalty. In the instant case the whole fund primarily liable was the realty. It alone was undisposed of. Although the Schedules are generally treated as referring purely to the payment of debts, Danckwerts J. again treated the provision for retention of legacies out of undisposed of property as making the statutory order apply to provision for legacies. " I am unable to see," he said, " what is the object of setting aside a fund, unless that fund is to be used for the payment of the legacies for which it is to provide. . . . I am dealing simply with one asset, the undisposed of real estate, and out of that undisposed of real estate a fund is to be raised to provide for the pecuniary legacies."

The difficulty always raised in this connection by legacies is that they do not pre-exist as " assets " of the estate, and must therefore be raised out of other assets, real or personal. When paying debts, one must obviously resort to the net undisposed of property rather than to the legacies. At the same time the statute clearly assumes that legacies should in fact be raised out of this property, if any, before raising them out of residue or by abatement among themselves.

(Theobald 693.)

Dean v. *Wiesengrund* [1955] 2 W.L.R. 1171; [1955] 2 All E.R. 432 (C.A.)

Property passing to executor—statutory right of action.—This case might be considered as one purely of landlord and tenant or of statutory interpretation. Whether a right of action is purely personal or survives on death depends on the context in the field of obligations. A brief reference must therefore suffice.

Section 14 of the Rent Restriction Act of 1920 enables a tenant to recover from his landlord payments of rent in excess of the standard rent. It was held that this is a right in the nature of a contractual asset, and survives in favour of the personal representatives of the tenant.

An interesting point is mentioned by Jenkins L.J., that a tenant

may well have no intention of suing for such overpayments, as "gentlemen's agreements" are not uncommon. But this point was held not decisive in the circumstances.

The general provisions of section 1 of the Law Reform Act of 1934 are now so wide that they were considered to make most rights of action survive.

(Williams on Executors, 383, 384, 949.)

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4. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Smith v. *East Elloe R. D. C.* [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19; 5 P. & C.R. 148

Compulsory purchase order—allegation of mala fides—action for declaration of invalidity—jurisdiction.—Some years after the making of a compulsory purchase order in respect of certain land owned by the plaintiff, she sued the local authority concerned (and others) for (*inter alia*) a declaration that the order was invalid as made in bad faith. The defendants applied to set the writ aside on the ground that the court had no jurisdiction to entertain the action; they relied on Schedule I, paragraph 16, of the Acquisition of Land (Authorisation Procedure) Act, 1946, as excluding the court's jurisdiction. The case reduced to the question: does that paragraph apply to all compulsory purchase orders made under the 1946 Act, or not? *Held*—and affirmed by the Court of Appeal—that it did, and the writ must be set aside. This only means, of course, that an acquiring authority gets the land notwithstanding any dirty work that may have gone on, unless the order can be and is challenged by the procedure laid down by Schedule I to the 1946 Act; it does not mean that nobody is liable in damages for action taken *mala fide*.

Park Estate (Bridlington), Ltd. v. *East Riding C. C.* [1955] 2 W.L.R. 1021; [1955] 2 All E.R. 269; 5 P. & C.R. 154

Planning control—enforcement notice—old development—appeal against notice.—In this case it was held (by the Divisional Court, on case stated, upheld by the Court of Appeal), that an enforcement notice, relating to development which in fact was pre-1948 development but referring only to sections 23 and 24 of the Town and Country Planning Act, 1947, and making no mention of section 75, can be quashed by a court of summary jurisdiction on appeal against the notice: the development in such cases is development for which no permission under Part III of the 1947 Act is required. This is in accordance with earlier decisions. It means, be it noted, that any

objection to an enforcement notice on the ground that the development is "old" development must be taken by way of appeal against the notice, and cannot be taken in defence to a prosecution for disobeying the notice.

Lambe v. *Secretary of State for War* [1955] 2 W.L.R. 1127; [1955] 2 All E.R. 386

Compulsory purchase — compensation — "special suitability."— In this case—noted at (1954) 18 *Conveyancer* 426—taken on case stated from the Lands Tribunal, the Court of Appeal confirmed that where the acquiring authority for land acquired compulsorily is the sitting tenant of the land, the extra value of the freehold to the authority attributable to the advantages of merging the tenancy with the freehold must be taken into account in assessing compensation, and not excluded either as "special suitability" of the land for a particular purpose, or as special value attributable to the "scheme" of which the purchase formed part. Thus, the proper measure of compensation was the amount the authority, as sitting tenants, would be willing to pay for the freehold in friendly negotiations with the owner if they had no compulsory powers.

W. Rought, Ltd. v. *West Suffolk C. C.* [1955] 2 W.L.R. 1080; [1955] 2 All E.R. 337

Compulsory purchase—compensation—saving in tax.—On a claim for compensation for disturbance, based on the loss of profit while the occupiers of land compulsorily acquired were finding other premises, the acquiring authority argued that the compensation payable must be reduced by the amount of tax the occupiers would have had to pay on their profit, if they had been allowed to earn it instead of being turned out of their premises. The Court of Appeal rejected the argument: tax is a private matter between the taxpayer and the Crown.

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5. *LANDLORD AND TENANT*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Comber v. *Fleet Electrics* [1955] 1 W.L.R. 566; [1955] 2 All E.R. 161

Covenant not to assign or underlet and not to change user without consent—executory agreement for payment of money—whether a fine —section 144 of the Law of Property Act, 1925, and section 18 (3) of the Landlord and Tenant Act, 1927.—In this case the landlords of shop premises sought to enforce an undertaking given by the tenants,

in a document not under seal, to assign to the landlord the tenants' share of certain compensation moneys (payable in respect of the compulsory acquisition of the front portion of the shop premises for the purposes of an improvement line) in consideration of the grant of a licence to assign and underlet and change the user of the premises. The tenants resisted the claim on the grounds that the assignment of the moneys was in the nature of a fine, and was contrary to section 144 of the Law of Property Act, 1925, and section 19 (3) of the Landlord and Tenant Act, 1927; they also contended that the undertaking to assign the moneys was an illegal consideration, or that there was no consideration for the undertaking. It was held by Vaisey J. that the tenants' undertaking was an agreement to pay a fine within section 144 of the Law of Property Act, 1925, and section 19 (3) of the Landlord and Tenant Act, 1927. It was, therefore, an undertaking without consideration or *nudum pactum*, and hence unenforceable. If, however, the money had actually been paid over it would not have been recoverable. The payment of a fine is not made illegal. These dicta by Vaisey J. are in accordance with *Waite* v. *Jennings* [1906] 2 K.B. 11, and *Andrew* v. *Bridgman* [1907] 2 K.B. 494. Vaisey J. also said that the position would have been different if the document had been executed under seal. He appears to mean by this a promise under seal to assign, not a completed assignment under seal. This dictum is perhaps not wholly free from doubt.

(Woodfall, 25th ed., Permanent Supplement, pp. 101 and 106)

Owen Owen Estate, Ltd. v. *Livett* [1955] 3 W.L.R. 1; [1955] 2 All E.R. 513

Landlord and Tenant Act, 1927—*improvement made in pursuance of contract—contract with third party—exclusion of compensation—procedure.*—Section 2 (1) (b) of the Landlord and Tenant Act, 1927, excludes compensation for improvements in a case where the tenant was under an obligation to make the improvement "in pursuance of a contract entered into, whether before or after the passing of this Act, for valuable consideration, including a building lease." The neat point decided by Upjohn J. in the present case was whether the contractual obligation which excludes compensation must be a contract between the landlord and the tenant, or whether a contract between the tenant and a third party was covered by section 2 (1) (b). In fact the contract in this case was a contract between the tenant and his under-tenant in the form of a covenant in the underlease. When the tenant served notice in the prescribed manner of a proposal to make the improvements in question the landlord gave notice of objection, not on the merits, but on the construction of section 2 (1) (b), contending that compensation was excluded by reason of the contract with the under-tenant. Upjohn J. held that there was no justification for cutting down the generality of the words in section 2 (1) (b) and construing them as confined to a contract between landlord and tenant. Compensation was, therefore, excluded. He also held, on a procedural point, that the correct proceedings were an originating summons for

construction under Ord. 54A, r. 1A, not a summons applying to the High Court as the Tribunal under section 63 (2) (b) of the 1954 Act for a certificate under section 3 (1) of the 1927 Act, that the improvements proposed were proper.

(Woodfall, 25th ed., Permanent Supplement, p. 43)

Rialto Cinemas, Ltd. v. *Wolfe* [1955] 1 W.L.R. 693; [1955] 2 All E.R. 530

Landlord and Tenant Act, 1927—landlord's offer of renewal of tenancy—settlement of term and rent by tribunal—principles.—The tenant of the Cameo Cinema in Charing Cross Road claimed a new lease under section 5 or compensation for goodwill under section 4 of the Landlord and Tenant Act, 1927. The landlords served a notice on the tenants under section 4 (1) (b) of the Act, offering a renewal of the tenancy at such rent and for such terms as, failing agreement, the tribunal should consider reasonable. On consideration of the referee's report, Ashworth J. decided as follows:—(a) the goodwill attaching to the premises did not entitle the tenants to the maximum term of 14 years which the tribunal could give under section 4 (1) (b). A term of 10 years was more appropriate; (b) the tribunal has no jurisdiction under section 4 (1) (b) to impose a condition based on section 5 (5), giving the landlord the right to resume possession in certain circumstances after 7 years; jurisdiction under section 4 (1) (b) is confined to settling, in the absence of agreement, the rent and term; (c) the rent should be assessed by first determining the "goodwill" rent and then making an appropriate deduction to eliminate the factor of net adherent goodwill; 10 per cent. was deducted in the present case; (d) in determining the "goodwill" rent, it was proper to have regard to trading profits. The method adopted was to deduct from the gross takings a figure for expenditure, excluding rent, a figure for the tenant's profit and interest on capital, and a figure for repairs. The balance was the amount of the "goodwill" rent, from which 10 per cent. was deducted to arrive at the rent payable by the tenant for the renewed term.

The case is now of reduced interest as sections 4 and 5 of the Landlord and Tenant Act, 1927, have been repealed by the Landlord and Tenant Act, 1954.

Paisner v. *Goodrich* [1955] 2 W.L.R. 1071; [1955] 2 All E.R. 330

Rent Restrictions Acts—"sharing"—sharing of extra bedroom with landlord—concurrent or consecutive use—premises not let as a separate dwelling.—This is another decision which shows that *Neale* v. *Del Soto* [1945] K.B. 144 is not dead. Four rooms were let unfurnished by the landlord to the tenant together with the use in common of a back bedroom. There were also arrangements for sharing a bathroom and lavatories. After the tenancy agreement was signed the landlord in fact refused to allow the spare bedroom to be shared

by the tenant. For a time after the landlord's death the tenant did make use of it, but the landlord's successors in title now claimed possession on the ground that, by reason of the arrangement for sharing the bedroom, the dwelling was not let as a separate dwelling. The majority of the Court of Appeal (Romer and Parker L.JJ.) came (" reluctantly ") to the conclusion that the landlord's claim succeeded. Denning L.J. dissented. The majority view was (a) that the right to share the bedroom was a right to share living accommodation, " essential " in the sense of not unimportant, within the *Neale* v. *Del Soto* line of cases, (b) that the test of what is essential is objective, *i.e.*, whether it is part of the essential make-up of the house, not whether it is essential for the particular tenant, (c) that it is the right to share, not the actual *de facto* user, which is material, (d) that the principle of *Neale* v. *Del Soto* applies whether the contemplated sharing is concurrent or consecutive. Denning L.J. felt less constrained than his brethren by authority, deprecated too much reliance on the judge-made gloss on the words of the statute, and was prepared to hold that, despite the sharing arrangement, the four rooms were " let as a separate dwelling." The editors of the eighth edition of *Megarry* are to be congratulated on the feat of having included the present case in the new edition.

(Megarry, 8th ed., pp. 65, 67, 68)

Dean v. *Wiesengrund* [1955] 2 W.L.R. 1171; [1955] 2 All E.R. 432

Rent Restrictions Acts—recovery of overpaid rent—right exercisable by personal representatives of the deceased tenant.—The wording of section 14 (1) of the 1920 Rent Act, relating to the recovery of overpayments of rent, " the sum so paid shall be recoverable from the landlord . . . who received the payment or his legal personal representative by the tenant . . . by whom it was paid," suggests, by specifying the landlord's personal representative and not the tenant's, that the tenant's right to recover is personal to him and does not pass to his personal representative. This construction, based on the maxim *expressio unius exclusio alterius,* found favour in the Irish cases of *Twomey* v. *Cronin* [1937] I.R. 624 and *Minto* v. *Cahill* [1940] I.R. 302, but it has strange results. A debt the benefit of which is presumably capable of assignment during the tenant's lifetime and would pass to his trustee in bankruptcy would, according to this view, fail to survive the tenant's death for the benefit of his estate. The Court of Appeal have now rejected this view, basing themselves both on the construction of section 14 (1) itself and, as a second string, on section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934.

It was recalled that in *Colquhoun* v. *Brooks* (1888) 21 Q.B.D. 52, 65, Lopes L.J. said of the maxim *expressio unius exclusio alterius* that " it is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents." When balanced against the general law about the recovery of debts due to the deceased, and common sense, the Court of Appeal were unanimous that the

specific reference to the landlord's personal representative was not a strong enough reason for regarding the tenant's right of recovery as an oddity which did not possess one of the normal incidents of such a right, namely, transmissibility on death.

(Megarry, 8th ed., p. 393)

Ottway v. *Jones* [1955] 1 W.L.R. 706; [1955] 2 All E.R. 585

Rent Restrictions Acts—judge's discretion as to costs.—In this case the county court judge ordered the successful defendant in an action brought against him for possession under the Rent Restrictions Acts to pay the plaintiff landlord's costs. The landlord had established instances of conduct on the part of the tenant amounting to nuisance or annoyance to adjoining occupiers within para. (6) of Schedule 1 to the 1933 Act, but the last of these incidents took place nine months before the hearing. In the circumstances the judge held it would be unreasonable to order possession. On an appeal from the order as to costs the Court of Appeal distinguished the peculiar features of a possession action under the Rent Acts from an ordinary action in which the plaintiff succeeds if he establishes a legal right and its breach. Under the Rent Acts the plaintiff has to establish a legal ground for possession but he then has to submit himself to the discretion of the judge on the issue of reasonableness. He may be refused an order for possession for reasons of which he has no knowledge—*e.g.*, the defendant's personal or family circumstances. In the ordinary case where a defendant is wholly successful it would not be a proper exercise of judicial discretion to order him to pay the plaintiff's costs, but this cannot necessarily be said of a possession application under the Rent Acts for the reason given above. The judge's order as to costs was not, therefore, interfered with by the Court of Appeal.

Lloyds Bank, Ltd. v. *Jones* [1955] 3 W.L.R. 5; (*sub nom. Re Lower Onibury Farm*) [1955] 2 All E.R. 409

Agricultural holdings—right of appeal from county court judge's decision on case stated for opinion—construction of covenant personally to occupy farmhouse—position of trustees—waiver.—In this case a number of points of interest to those concerned with agricultural holdings were decided. The proceedings arose out of a covenant in an agricultural tenancy agreement under which the tenant undertook at all times personally to inhabit the farmhouse, a type of covenant which is quite commonly found. After the death of one tenant one of his trustees, his widow, occupied the farmhouse for a number of years, but the other trustee did not. When the widow died the successor of the other trustee did not occupy, but allowed a beneficiary under the will of the tenant mentioned above to do so. The landlords served a notice on the surviving trustee under section 24 (2) (d) of the Agricultural Holdings Act, 1948, calling on him

to remedy his breach by taking up residence in the farmhouse. When he failed to do so the landlords served a notice to quit in pursuance of section 24 (2) (d). The trustee, in whom it was admitted that the tenancy vested, replied with a notice requiring arbitration under the Agriculture (Control of Notices to Quit) Regulations, 1948. The arbitrator stated a case for the opinion of the county court judge under paragraph 24 of the Sixth Schedule to the Agricultural Holdings Act, 1948, on the construction of the covenant. The county court judge found that the clause was binding on trustees but that the breach of it had been waived and the landlords could not, therefore, rely on the breach for the purpose of section 24 (2) (d). On appeal to the Court of Appeal, the following points were decided or discussed:

(a) On a preliminary point, it was held that there was a right of appeal to the Court of Appeal, the argument, based on *Re Knight and the Tabernacle Permanent Benefit Building Society* [1892] 2 Q.B. 613, that the county court judge's jurisdiction was only a consultative one ("a special case for the *opinion* of the county court judge") being rejected. The Court of Appeal held that the county court judge's decision was a decision or direction within the wording, "judgment, direction, decision or order," in section 105 of the County Courts Act, 1934, which gives a right of appeal to the Court of Appeal. (b) It was held that the covenant personally to inhabit the farmhouse was a covenant which ran with the land and was binding on a trustee in whom the legal tenancy was vested even if he held no beneficial interest. It may be noted here that there may be practical difficulties about the observance of such a covenant and that it may be desirable to provide that where there is more than one trustee, residence by one will be sufficient observance of the covenant. This is a conveyancing point which deserves attention. (c) Failure by the landlords to insist on both of two trustees residing in the farmhouse was not such a waiver of breach of covenant as to disentitle them to enforce the covenant later against the surviving trustee. (d) It may be noted that breach of a covenant of this kind was treated as a remediable breach for the purpose of section 24 (2) (d) of the Agricultural Holdings Act, 1948.

L. C. C. v. *Vitamins, Ltd.*; *L. C. C.* v. *Agricultural Food Products, Ltd.* [1955] 2 W.L.R. 925; [1955] 2 All E.R. 229

Notice to quit—signature by proxy—proof of authority—signature by valuer's assistant in valuer's name—not "per pro."—notice valid. —The tenancy agreement provided that a notice to quit given by the landlords should be signed by the valuer to the council. A notice to quit was given to the tenant which bore the valuer's name, but the name was in fact written by one of his assistants. There was nothing to indicate that the signature was by proxy. The tenants contended that the notice was not signed as required by the tenancy agreement, and was therefore invalid. The Court of Appeal held that at common law a person sufficiently "signs" a document if it is signed in his name and with his authority by somebody else, and

in such case the agent's signature is treated as being that of his principal. There was nothing in the tenancy agreement to exclude this common law rule. The court ordered a new trial to give the landlords an opportunity of showing whether the assistant had authority to sign in the valuer's name. The court did not regard the absence of any indication that the signature was by proxy as a fatal flaw, but Denning L.J. expressed the view that it is bad practice to omit the letters "p.p." (*per procurationem*) after the signature, followed by the initials of the person actually writing the signature. "The assistant should add the letters 'p.p.' followed by his initials."

(Woodfall, 25th ed., p. 1035)

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6. *REVENUE CASES*

By David R. Stanford, M.A., LL.B., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Taxation Reports* (T.R.).)

J. v. *J.* [1955] 3 W.L.R. 72; [1955] 2 All E.R. 617 (C.A.)

Income Tax—Maintenance Order—Annual payments

Statutory provisions: Income Tax Act, 1952, s. 170; Matrimonial Causes Act, 1950, s. 19 (3).

Point: This case underlines the importance of all parties to an application for maintenance on divorce (and equally on an agreement for periodical payments on separation or divorce) appreciating the effect of taxation on any annual payments. The periodical payments ordered or agreed will be annual payments and the payer will deduct tax at the standard rate for the time being in force on making the payments (Income Tax Act, 1952, ss. 169, 170). If paid out of taxed income the payer will retain the tax deducted; if not so paid he will account to the Revenue for such tax. The recipient, if liable to tax at less than the standard rate (*e.g.*, on account of personal reliefs and allowances), may reclaim from the Revenue any excess tax deducted. For the purpose of making any such repayment claim (and also for payment of surtax if applicable) the gross sum paid, *i.e.*, actual payment plus tax deducted, is part of the total income of the payee. If an Order is made for the payment of a sum of £X "free of tax" this is merely shorthand for ordering the payment of a gross sum of the fluctuating amount of "such a sum as after deduction of income tax at the standard rate for the time being in force shall leave the sum of £X."

Facts and Decision: The husband's total income for tax purposes was less than £100 per annum, but his standard of living was in excess of £1,000 per annum owing to his occupation being the conduct of building operations financed by loans out of which he paid his

living expenses. The judge of first instance, intending to order maintenance for the wife after decree nisi of divorce at such rate as would give her the clear sum of £5 10s. per week after tax paid, ordered the husband to pay interim maintenance at the rate of "£5 10s. per week free of tax." The result of such order was that the net cost to the husband of the maintenance payments was £10 per week (£5 10s. grossed up at the then standard rate) and the net gain to the wife was in excess of £5 10s. per week by reason of the repayment of tax she was entitled to on account of her personal reliefs and allowances.

Held: The order should be for "£7 per week less tax," an order "which in the known circumstances at the current rate of tax will give the wife a figure approximating to that which the court intends her to receive when her allowances are taken into account" (*per* Hodson L.J., at 2 All E.R. p. 623).

C. I. R. v. *Countess of Kenmare* [1955] T.R. 179; 48 R. & I.T. 442 (Ch.D.)

Surtax—Settlement—Power of revocation

Statutory provisions: Finance Act, 1938, ss. 38 (2) and (7), 41 (4), Schedule III (now Income Tax Act, 1952, ss. 404 (2), 406, 410, 411).

Point: A power given to the trustees of a settlement to declare new trusts of the trust fund in favour of the settlor, or of successive parts of the trust fund which may in the aggregate amount over a period of time to the whole fund, is a power to revoke the settlement. In consequence, by virtue of Income Tax Act, 1952, s. 404 (2), if such power can be exercised within 6 years from the time that any particular property became comprised in the settlement, the income therefrom will be deemed income of the settlor and not of any other person. *Semble*, if such power is in favour of the wife or husband of the settlor, the trustees would have power to determine the settlement, with the like result.

It may be noted that in the present case the power could not be exercised to exhaust the trust fund within six years unless the investments were drastically reduced in value, but this point was not argued (see *per* Danckwerts J. at T.R. p. 181, col. 1). It would still appear to be arguable that if such a power could only be exercised as to a part of the fund (*e.g.*, all but £100 thereof) the power is not one of revocation. However, it is not wholly clear from the judgment (or at least the available report of the case which contains no note of the arguments) how far the decision rests on the ability of the trustees ultimately to exhaust the whole fund. This case may have serious repercussions on existing settlements containing wide powers of appointment.

The provisions of Income Tax Act, 1952, s. 404 (2), may apply even though the settlement is made abroad and governed by foreign

law and despite the settlor and the trustees being neither resident nor ordinarily resident in the United Kingdom.

Facts and Decision: Lady Kenmare, who was not at any material time resident or ordinarily resident in the United Kingdom, settled investments to the value of £700,000 upon various trusts, governed by the law of Bermuda, for herself and her children. The trust fund, which was invested in the United Kingdom, was held by trustees who were neither resident nor ordinarily resident in the United Kingdom. By the settlement the trustees were given power at any time in their absolute discretion to "declare that any part of the trust fund . . . shall thenceforth be held in trust for the settlor absolutely . . . Provided Always that the foregoing power shall not be exercisable by the trustees so as to vest in the settlor in any period of three years . . . a part or parts of the trust fund or property of a value or aggregate value exceeding £60,000. . . ." Lady Kenmare was assessed to surtax on the income of the settlement, the Revenue contending that the afore-mentioned power was a power of revocation within Finance Act, 1938, s. 38 (2) (now Income Tax Act, 1952, s. 404 (2)). The taxpayer contended (i) that the power was merely one to substitute one trust for another, the settlement continuing, and (ii) that the levying of tax on a settlor who is non-resident, in respect of income which is not his income from property in the United Kingdom, but is the income of trustees who are also non-resident, and operating under a settlement not governed by the law of any part of the United Kingdom is beyond the recognised taxing power of the legislature of this country. The Special Commissioners came to no conclusion on the first point as they decided in favour of the taxpayer on the second.

Held: (1) The settlement was revocable. Danckwerts J., making a general statement before giving his particular reason for judgment (see [1955] T.R. p. 182, col. 1) said: " . . . It seems to me that if there is a revocation of the trust, whether it is subject to a limitation or not there is a revocation or determination of either the settlement or some provision thereof. It seems to me that there is quite clearly a determination of the provisions settling the property in trust for other persons in respect of the trust fund, so far as the trustees have by their declaration in writing power to deal with the trust fund at any particular time, and this is a power which might in the end, therefore, possibly be exercised in regard to the whole trust fund."

(2) The terms of the settlement and the position of the settlor fall within the provisions of Finance Act, 1938, s. 38 (2) (now Income Tax Act, 1952, s. 404 (2)). His Lordship noted (i) that the legislation of Parliament within the United Kingdom is not subject to limitations of any kind whatsoever, (ii) the income was income of property in this country, (iii) the definition of "income arising under a settlement" contemplates the payment thereof to non-residents: Finance Act, 1938, s. 41 (4) (now Income Tax Act, 1952, s. 411 (1)) and (iv) Finance Act, 1938, s. 38 (7) refers to "any settlement wherever made."

C. I. R. v. *Pay* [1955] T.R. 165; 48 R. & I.T. 412 (Ch.D.)

Surtax—Settlement—Payments to trustees by settlor

Statutory provisions: Finance Act, 1938, ss. 39, 41 (3) (4) (now Income Tax Act, 1952, ss. 407, 411).

Point: A number of transactions, if arranged simultaneously, may form together one composite transaction which is an " agreement or arrangement " and hence a settlement for the purposes of the stringent provisions of Part XVIII of the Income Tax Act, 1952, despite one of such transactions being a settlement within the normal meaning of the word. Payments made by reason of any of the separate transactions making up the composite settlement may be paid " by virtue or in consequence of the settlement."

Facts and Decision: Mrs. Pay, acting on legal advice, entered into an ingenious scheme whereby it was attempted to make annual payments to trustees of a settlement made by her in such a manner that, despite the accumulation of such income in the settlement, the income would not be deemed that of the settlor. By means of a letter written to Mrs. Pay by her solicitors the scheme was shown to have been completely arranged before the first transaction was entered into. She drew a cheque for £60,000 in favour of trustees and at the same time the trustees drew a cheque for a similar amount in her favour, the cheques cancelling each other out and no payment in cash in fact being made. The " payment " to the trustees was to be held on the trusts of a settlement of later date which recited the fact of such " payment " and declared various trusts of the said sum of £60,000 for the benefit of her grandchild and others. The " payment " by the trustees was a loan to Mrs. Pay on mortgage of certain land owned by her, and the registered charge of later date charged the loan and the interest thereon exclusively on the property, exonerating Mrs. Pay from personal liability therefor. If interest was duly paid, it was provided that the loan should not be called in during Mrs. Pay's lifetime. In paying the interest Mrs. Pay deducted the sums in computing her total income for purposes of surtax. There being undistributed income under the settlement, the income having been accumulated, such deductions were disallowed, it being alleged that the payments of interest were sums paid by the settlor " by virtue or in consequence of any settlement . . . to the trustees of the settlement " (Income Tax Act, 1952, s. 407). The taxpayer contended that there was no " settlement " other than the actual deed of settlement itself and that the payments were made by reason of the fact that she was the owner of the land charged and not " by virtue or in consequence of " the settlement.

Held: The deductions should be disallowed. The execution of the settlement, the execution of the charge and the payments of the sums of £60,000 were all one transaction, one scheme, designed to carry out the purpose of the settlor and hence a settlement within the meaning of Income Tax Act, 1952, s. 411 (2). The payments of interest were made because Mrs. Pay created the charge and the creation of the charge was part of the arrangement which constituted the " settlement." Danckwerts J. summarily refuted the contention

of the taxpayer (which had been accepted by the Special Commissioners) that "if you find that part of the arrangement includes a settlement in the more restricted meaning then it is impossible for the whole also to be a settlement."

Pattullo's Trustees v. *C. I. R.* [1955] T.R. 105; 48 R. & I.T. 209 (Ct. of Sess.)

Income Tax—Trading—Trustees

Statutory provision: Income Tax Act, 1952, s. 123 (Schedule D, Case I).

Point: The elusive dividing line between "realisation of assets" and "trading" is particularly vague where action is taken by executors to avoid loss on half-completed contracts of the deceased. The mere fact that contracts are completed to avoid severe loss to the estate and that no new contracts are entered into is not sufficient basis for a claim that the activity is merely realisation of the estate to the best advantage.

Facts and Decision: Mr. Pattullo, in the course of his business of cattle-feeding, made contracts with other farmers whereby they wintered his cattle until they were ready for sale. He supplied the feeding stuffs and the other farmers got the benefit of the manure. On his death his trustees, instead of renouncing the contracts at a considerable loss (the other farmers being in a position to claim compensation for loss of manurial values) fulfilled them. They entered into no new contracts but purchased 76 additional cattle, paid wages and bought further feeding stuffs. The General Commissioners decided that the trustees were carrying on the business of trading in cattle-feeding.

Held: There was evidence to support the view of the General Commissioners.

Re David Bell, Ltd. [1955] T.R. 101 (Ct. of Sess.)

Profits Tax—Reduction of capital—Avoidance of tax

Statutory provisions: Finance Act, 1947, s. 36 (1); Companies Act, 1948, s. 67.

Point: In considering a company's petition for confirmation of the reduction of capital the fact that thereby there is an avoidance of the potential incidence of profits tax is not a material consideration to be taken into account in the exercise of the court's power.

Facts and Decision: The company's capital was 120,000 £1 shares fully paid. The company being in possession of funds surplus to its trading requirements it was resolved to reduce the capital by returning 5s. per share and reducing the nominal value of each share from £1 to 15s. The company could have made a cash distribution of £30,000 to shareholders without any reduction of capital as the

amount at credit of the profit and loss account was largely in excess of that sum. The latter course would have involved the company in increased liability for profits tax and might have involved shareholders in liability for surtax.

Held: Reduction of capital confirmed. The "decision of the House of Lords in *Ex parte Westburn Sugar Refineries, Ltd.* [1951] A.C. 625, removes any doubt that might be created by the previous decision in the case of *Re A. & D. Fraser, Ltd.*, 1951 S.C. 394" (*per* the Lord President at T.R. p. 102).

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7. *MISCELLANEOUS*

Mosey v. *Mosey and Barker* [1955] 2 W.L.R. 1118; [1955] 2 All E.R. 391

Husband and wife—divorce—order for secured provision—death of husband before deed executed—power to vary an application of the husband's personal representative.—After a decree of divorce, an order was made under the Matrimonial Causes Act, 1950, ss. 19 and 26, that the husband should secure to the wife (i) the annual sum of £300 for her life upon part of the husband's real property to be agreed or to be referred to the registrar, and (ii) the gross sum of £750 for the benefit of the child of the marriage upon part of the husband's real property. Before the parties' solicitors agreed on the property to constitute the security the husband died and the wife applied to enforce the order. The husband's executor contended that the order was no longer enforceable and, by a cross-application, asked that, if it was, it should be varied. It had been held in *Dipple* v. *Dipple* [1942] P. 65 that the wife's right to apply for secured maintenance was not a cause of action which survived the death of the husband, so that, where the husband died between the making of the application and the hearing, the wife's rights were extinguished. On the other hand, *Hyde* v. *Hyde* [1948] P. 198 decided that where agreement had been reached as to the security to be provided, but no deed had been executed, before the husband's death, the wife acquired an equitable charge on the agreed property and her rights survived the death.

Sachs J. was inclined to the view that the order made did create a charge on the whole of the husband's real property until the specific part to be charged was ascertained, but he did not decide this point specifically, holding that the wife's right under the order survived the husband's death by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). On the cross-application, the learned judge held that the right to apply for a variation under the Matrimonial Causes Act, 1950, s. 28, did not survive the death.

CORRESPONDENCE

To the Editor,
The Conveyancer & Property Lawyer.

Dear Sir,

Retirement of Personal Representative

I have read with interest the article appearing at page 199 of the May/June number of *The Conveyancer* by Mr. B. S. Ker. While it seems clear that the law is as set out, I feel that the suggestion contained at the conclusion of the article, while being good law, may not be good practice.

Assuming that A, the personal representative, wishes to retire from the administration of the estate of D, deceased, following D's intestacy and while there are still statutory trusts under the intestacy to fulfil, he no doubt might legally pass responsibility for management by appointing a new trustee, T, as suggested. This course, while relieving A of further duties, does not enable him to divest himself of his actual legal responsibilities as an administrator, and notwithstanding the appointment he is ultimately responsible to all beneficiaries if difficulty arises in the future. Should he, therefore, divest himself in this way of the control of the funds for which he will be responsible; and surely the bondsmen should be consulted before this is done in view of the decision in *Harvell* v. *Foster* [1954] 2 Q.B. 367?

While the law may allow A to "retire" in the manner suggested I feel that in practice very careful consideration should be given to such a case before the suggestion is put into practice.

Yours faithfully,

A. G. Stewart Gumersall.

Epsom, June 13, 1955.

THE LIBRARY

Profit-Sharing in Practice and Law. By JOHN C. HARPER, LL.B., Barrister-at-Law. Sweet & Maxwell, Ltd. xxiv, 357 and (index) 10 pp. (38s. 6d.)

The preparation of a profit-sharing scheme is an act of collaboration in which the employers, their accountant and solicitor are the minimum parties; the scheme, if it is to be successful, cannot be drafted in blithe disregard of the nature of the business, its record of prosperity and future outlook and the industrial atmosphere of the concern. Mr. Harper claims that his book has been written primarily for business-men, but he does not really do justice to himself: it is a lawyers', indeed a practitioners', book complete with a battery of practical precedents, but it is not content merely to state the law and legal practice; it is as though the author says: "Look, it is no use your thinking that all you have got to do is to draw a trust deed that is not technically defective. You have got to find out whether the scheme is going to work and what effect it is going to have on the business, and to do that you have got to ask your client a lot of questions and get a lot of information from him first. I will tell you what to ask and the nature of the information you want." The result is that not only are the legal aspects, such as the rule against perpetuities, the incidence of income tax, the provisions of the Superannuation and Other Trust Funds (Validation) Act, 1927, etc., dealt with, but also the circumstances which make a particular time for launching the scheme propitious, the attitude of the trade unions, the proportion of profit that can be put into the scheme without jeopardy to the business and similar matters. No doubt the lawyer will find some of the exposition of company law, and the business-man some of that of the reaction of employees, elementary, but the work taken as a whole is a thorough, workmanlike job. If a solicitor wanders into a realm of law entirely new to him he is often haunted by doubts whether there is some major point that he was unaware of or has overlooked which makes his advice wrong or his drafting ineffective or inept, but one has the feeling that, if the realm is profit-sharing, there will be no ground for these doubts if he pays attention to the points made in Mr. Harper's book.

E. F. G.

We have also received:—

Private International Law. By J. A. C. Thomas, M.A., LL.B., Barrister-at-Law. 174 pp. *The Law of Civil Injuries.* By Hamish R. Gray, LL.M., Solicitor. 191 pp. Hutchinson's University Library. (8s. 6d. each.) These two books are well-written introductions to their subjects, reasonably priced. In Mr. Gray's book for some inexplicable reason, the footnotes are placed together at the end of each chapter and the table of cases appears at the end of the book.

Road Charges. By J. F. Garner, LL.M., Solicitor, Town Clerk of Andover. "Oyez Practice Notes" Series. The Solicitors' Law Stationery Society, Ltd. 72 pp. (8s. 6d.) Mr. Garner needs no introduction to readers of *The Conveyancer* and it is only necessary to record that he appears to have done his job with his usual efficiency and accuracy; he has added a short appendix of precedents of clauses dealing with road charges.

Islamic Law in Africa. By J. N. D. Anderson, Professor of Oriental Laws in the University of London. H.M. Stationery Office. 409 pp. (£2 10s.)

Obtaining Letters of Administration. By D. R. Le B. Holloway, LL.B., of the Principal Probate Registry. Oyez Practice Notes. The Solicitors' Law Stationery Society, Ltd. 98 and (index) 10 pp. (10s. 6d.) This booklet is complementary to the earlier one, *Proving a Will,* and contains a clear and concise statement of the practice relating to obtaining letters of administration and can be recommended.

Powers of Attorney. Second Edition. By J. F. Josling, Solicitor. Oyez Practice Notes. The Solicitors' Law Stationery Society, Ltd. 67 pp. (8s. 6d.)

Law and Disorders. By Sir Carleton Allen, Q.C., with illustrations by Leslie Starke. Stevens & Sons, Ltd. 162 pp. (10s. 6d.). No doubt the publishers sent us this book of light legal essays because it has nothing to do either with real property or conveyancing; but perhaps, this is not quite correct, for every essay contains a lesson on how to write English clearly and with pleasing effect.

The Modern Law Review. May, 1955. Stevens & Sons, Ltd. 112 pp. (6s.) This part contains an interesting lecture by Master Wheatcroft on the attitude of the legislature and the courts to tax avoidance, a subject of which he is indeed a master.